

Cornell Law School - Grade Report - 06/01/2023

Alessandra L Scalise

JD, Class of 2020

Course	Title	Instructor(s)	Credits	Grade
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Fall 2017 (8/22/2017 - 12/15/2017)

LAW 5001.1	Civil Procedure	Cavanagh	3.0	B+
LAW 5021.4	Constitutional Law	Tebbe	4.0	A-
LAW 5041.3	Contracts	Rachlinski	4.0	B+
LAW 5061.3	Criminal Law	Ohlin	3.0	B+
LAW 5081.6	Lawyering	McKee	2.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.4575
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.4575

Spring 2018 (1/15/2018 - 5/14/2018)

LAW 5001.1	Civil Procedure	Cavanagh	3.0	A-
LAW 5081.6	Lawyering	McKee	2.0	A-
LAW 5121.3	Property	Underkuffler	4.0	B
LAW 5151.3	Torts	Wendel	3.0	B+
LAW 6401.1	Evidence	Weyble	3.0	B+

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	15.0	15.0	3.3553
Cumulative	31.0	31.0	31.0	31.0	31.0	31.0	3.4080

Fall 2018 (8/21/2018 - 12/17/2018)

LAW 6005.1	Business and Financial Concepts for Lawyers	Magalhaes	1.0	SX
LAW 6131.1	Business Organizations	Awrey	4.0	A
LAW 6263.1	Criminal Procedure - Adjudication	Blume	3.0	A-
LAW 6861.602	Supervised Teaching	Feldman	2.0	SX
LAW 7162.101	Contemporary American Jury	Hans	3.0	A

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	10.0	10.0	3.9010
Cumulative	44.0	44.0	44.0	44.0	41.0	41.0	3.5282

^ Dean's List

Spring 2019 (1/22/2019 - 5/10/2019)

LAW 6441.1	Federal Income Taxation	Green	3.0	B
LAW 6821.1	Securities Regulation	Omarova	3.0	S
LAW 6871.602	Supervised Writing	Hans	2.0	SX
LAW 7321.101	International Criminal Law	Ndulo	3.0	A-
LAW 7869.301	Juvenile Life Without Parole Clinic	Blume/Knight/Weyble	4.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	10.0	10.0	3.4690
Cumulative	59.0	59.0	59.0	59.0	51.0	51.0	3.5166

Fall 2019 (8/27/2019 - 12/23/2019)

LAW 6241.1	Federal White Collar Crime	Garvey	3.0	A-
LAW 6881.650	Supervised Writing/Teaching Honors Fellow Program	McKee	2.0	SX
LAW 7232.101	Ethical Issues in Criminal Investigation, Prosecution & Policy	Bachrach	3.0	A
LAW 7855.301	International Human Rights: Litigation and Advocacy I	Babcock/Ahmed	4.0	A

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	12.0	12.0	12.0	12.0	10.0	10.0	3.9010
Cumulative	71.0	71.0	71.0	71.0	61.0	61.0	3.5796

^ Dean's List

6/1/23, 8:56 AM

Grade Reports

Spring 2020 (1/21/2020 - 5/8/2020)

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. Four law school courses were completed before mid-March and were unaffected by this change. Other units of Cornell University adopted other grading policies. Thus, letter grades other than S/U appear on some spring 2020 transcripts. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

LAW 6011.1	Administrative Law	Stiglitz	3.0	SX
LAW 6201.1	First Amendment: Religion Clauses	Tebbe	3.0	SX
LAW 6881.656	Supervised Writing/Teaching Honors Fellow Program	Mckee	2.0	SX
LAW 7860.301	International Human Rights: Litigation and Advocacy II	Babcock	5.0	SX

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	0.0	0.0	N/A
Cumulative	84.0	84.0	84.0	84.0	61.0	61.0	3.5796

Total Hours Earned: 84

Received JD on 05/24/2020



Cornell Law School

May 31, 2023

The Honorable Kiyo Matsumoto
United States District Court
for the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Alessandra L. Scalise

Dear Judge Matsumoto:

I have the distinct pleasure of recommending that you hire Alessandra Scalise as one of your law clerks. She was a very good student, she is a quality person, and I recommend her enthusiastically and without reservation.

I am the Samuel F. Leibowitz Professor of Trial Techniques at Cornell Law School and also the Director of the Cornell Death Penalty Project. Alessandra was a student in my Criminal Procedure class during the fall of 2017. She always came to class, participated actively in the class discussions, and did a very competent job on the final examination. She made an A- in the class, barely (and I mean barely) missing the cutoff for an A. I worked much more closely with Alessandra when she was a student in the Juvenile Justice Clinic the following semester. She worked on a number of different projects during her time in the clinic including several research and writing projects aimed at various juvenile justice reform efforts and she also traveled to South Carolina to interview witnesses for a resentencing case involving a juvenile formerly sentenced to life without parole. Alessandra did an excellent job on all of her assigned projects. She received an A- in the clinic as well.

Let me first address her research and writing skills. I found her research to be reliable, demonstrating a clear understanding of how to read cases, not just for the holding, but also for the holding in context and thus the case's relevance to the assigned task. That is not a skill all law students demonstrate. She also writes succinctly and clearly. Again, this is not a skill all law students possess. A further testament to her writing skills is also found in the fact that she was selected to be an Honors Fellow for the first year Lawyering Program. Additionally, Alessandra has a strong work ethic, and often volunteered for extra assignments. She was also excellent in the "field," demonstrating that she possesses good interviewing skills and dogged determination.



The Honorable Kiyo Matsumoto
May 31, 2023
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Overall, Alessandra was one of our most complete students. She graduated with a very respectable GPA, received the CALI award in several classes, and was involved in a number of different student activities including the Cornell Law Review (she was a Senior Articles Editor) and the Women's Law Association. She was also selected by Professor Valerie Hans to be an Eisenberg Research Fellow. Additionally, Alessandra is, based on my experience, mature, responsible and has a strong work ethic. She volunteered for extra clinic assignments, even during very busy times of the semester. She is also just a very nice person who works very well in a team setting and is a delight to be around. Alessandra will fit in extremely well in any judicial chambers and she will build excellent relationships with her co-clerks and the support staff.

In sum, there is no doubt in my mind that Alessandra has the skill set (very strong research and writing abilities, a sharp intelligence and nimble mind, persistence and engaging personality) that will make an outstanding judicial clerk.

Please do not hesitate to contact me if I can provide you with additional information. You can email me at jb94@cornell.edu or call my cell phone (803-240-7178). I am happy to discuss Alessandra's many skills and virtues in person as she is an excellent clerkship candidate.

Very truly yours,



John H. Blume

✓ Samuel F. Leibowitz Professor of Trial Techniques
and Director of the Cornell Death Penalty Project

**New York**

601 Lexington Avenue, 31st Floor
New York, NY 10022

Adam Siegel

T +1 (212) 277-4000
T +1 (212) 277-4032 (direct)
F +1 (646) 521-5632
E adam.siegel@freshfields.com

freshfields.us

April 19, 2023

Dear Honorable United States District Court Judge:

It is a great pleasure to recommend Alessandra Scalise to serve as a law clerk for Your Honor.

I have known Alessandra since she joined our 2019 summer associate program after her second year at Cornell Law School. I happily persuaded Alessandra to join us as an associate in the Fall of 2020. I have worked extensively with Alessandra on a number of matters over the last two and one-half years and know that she will be an excellent law clerk.

I have had the opportunity to work with Alessandra on three very complex investigations, two involving highly technical issues related to oil and gas accounting, and one concerning potential antitrust violations. All three matters were for very sophisticated multi-national corporations with extremely high levels of expectations from their external counsel. Alessandra did an excellent job on all of these matters, each of which enabled her to demonstrate both the ability to focus intently on the details of the case and her keen skill of understanding the complex big picture and how the various pieces fit together.

In addition, we asked Alessandra to join the legal department of Google, an important firm client, as a secondee where she was given significant responsibility to monitor and analyze developments in federal and state competition law. We only send our most trusted and gifted associates to work as a client lawyer.

I have been genuinely impressed by Alessandra over the years, as I have observed her develop into an extremely sophisticated lawyer. I should also note, as evidenced by her academic achievements, that Alessandra is also extremely smart. She is additionally a strong writer, who is able to differentiate the truly important aspects of a narrative when explaining it to others, and she has excellent analytical skills. In summary, I believe you would be very impressed by Alessandra's abilities.



Freshfields Bruckhaus Deringer is an international legal practice operating through Freshfields Bruckhaus Deringer US LLP, Freshfields Bruckhaus Deringer LLP, Freshfields Bruckhaus Deringer (a partnership registered in Hong Kong), Freshfields Bruckhaus Deringer Law office, Freshfields Bruckhaus Deringer Foreign Law Office, Studio Legale associato a Freshfields Bruckhaus Deringer, Freshfields Bruckhaus Deringer Rechtsanwälte Steuerberater PartG mbB, Freshfields Bruckhaus Deringer Rechtsanwälte PartG mbB and other associated entities and undertakings. For further regulatory information please refer to www.freshfields.com/support/legal-notice.

Perhaps as important, Alessandra is also a terrific colleague. I had the good fortune to begin my legal career as a law clerk to a United States District Judge, and I remember how often the Judge told me and my co-clerk how much he valued and needed our best collaborative behavior. I can assure you that Alessandra is a true pleasure to work with – she is dedicated, caring, hard-working and always willing to do more.

Alessandra also brings a mature perspective that belies her relatively short tenure as a lawyer. She worked as a paralegal and legal analyst at two litigation firms before deciding to attend Cornell Law School, having made a conscious and knowing choice to become a lawyer and litigator. She has lived and studied in multiple countries throughout her life and has a broad and open-minded perspective. I believe her time at Google helped her to see law not merely through the perspective of a litigator, but also as a litigant. I feel strongly that she will be a delightful addition to any Chambers, and contribute mightily to a kind, respectful and intellectually challenging environment.

Please do not hesitate to let me know if I may be of any further assistance as you consider Alessandra's application; I would be very happy to speak with you.

Sincerely,



Adam Siegel



Cornell Law School

Valerie P. Hans

Charles F. Rechlin Professor of Law

104 Myron Taylor Hall
Ithaca, New York 14853-4901
607.255.0095 / 607.255.7193 (fax)
Valerie.Hans@cornell.edu

May 31, 2023

The Honorable Kiyo Matsumoto
United States District Court
For the Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am pleased to offer a strong and enthusiastic endorsement of **Alessandra Scalise**, who has applied for a judicial clerkship with you. Based on my own extraordinarily positive experiences with Alessandra during her time as a Cornell Law School student, and her impressive work post-graduation, I am confident that she will be an excellent clerk. I encourage you to hire her.

I met Alessandra in 2018 when she enrolled in my Cornell Law School seminar course, Contemporary American Jury. The seminar was limited to sixteen students, all high-achieving students who had strong opinions about the matters we discussed during our seminar meetings. Yet Alessandra stood out with her deeply informed and thoughtful contributions during the class discussions.

The jury seminar required a substantial research paper. Alessandra decided on an innovative topic for her paper: the possibility of introducing a jury to the International Criminal Court (ICC). The ICC does not currently use juries in its decision-making. In fact, some countries including the USA point to the lack of a jury system as undermining the likelihood of a fair trial for defendants and the legitimacy of the ICC. Alessandra drew on empirical research to argue that introducing a jury system could provide much-needed legitimacy for the ICC. Acknowledging practical and other objections to a jury system at an international body like the ICC, Alessandra nonetheless sketched out an approach to structuring a jury system and made compelling arguments about its feasibility and its potential contribution to the ICC's legitimacy. The paper was a tour de force! It was beautifully written and well-argued, anticipating and responding to objections. She received an A and the CALI Award for the best performance in the course, based on the excellence of her research paper and her overall contributions to the class.

Based on her excellent performance, and her international interests and experiences, I invited her to do a supervised writing project the following year. She was selected as an Eisenberg Research Fellow to work with me on a current project, still ongoing, on lay participation systems in the continent of Africa. In previous research, my colleagues and I have discovered that many African countries rely on forms of lay legal decision-making, including as jurors, as lay judges in



mixed courts, as lay magistrates, and as decision-makers in tribal and other courts outside the formal legal system. Yet there is very limited research on these systems and how they operate in practice. Alessandra did a superb job in research and writing about the diverse systems currently in use. Her research has been extraordinarily helpful as we have presented early findings at the Law and Society Association conference and as we have undertaken the writing of a law review article on the topic of lay legal decision-making in Africa.

Alessandra took full advantage of the opportunity to participate in law-related student group activities during her time at Cornell Law School. She gained valuable legal experience by participating in the Juvenile Life Without Parole Clinic and the International Human Rights Clinic during law school, and she has continued to develop her legal skills post-graduation as a lawyer at Freshfields and Google. She further developed her research and writing skills as the Eisenberg Research Fellow, as an Honors Fellow, as a TA for Principles of American Legal Writing, and as Senior Articles Editor for the *Cornell Law Review*.

Alessandra will bring much of value to your chambers. A generous collaborator, she is extremely well-organized and will deploy her prodigious research and writing skills in any tasks she takes on. She also has a delightful and considerate personality. I encourage you to review her application most carefully. Should you wish to discuss any aspect of her candidacy, please do not hesitate to contact me.

Sincerely,



Valerie P. Hans, *Charles F. Rechlin Professor of Law*



Alessandra L. Scalise
(718) 844-6339 | alessandra.scalise@gmail.com

Writing Sample

The writing sample is an internal memorandum I wrote for Freshfields Bruckhaus Deringer in 2021 evaluating the viability of a statute-of-limitations withdrawal defense to criminal conspiracy charges. The firm has approved my using this document as a sample of my writing. I have revised the memorandum to remove certain facts and anonymize the individuals for confidentiality purposes. The writing is entirely my own.

Memorandum

To
Memorandum to File

Date
[DATE]

I. Introduction

You have asked us to evaluate (i) whether Individual 1, a national of a foreign country (“Foreign Country 1”) who worked as an engineering contractor at a U.S.-based subsidiary (“U.S. Sub 1”) of an international company (“Company 1”) has a viable statute-of-limitations/withdrawal defense to criminal conspiracy charges under 18 U.S.C. § 371 related to a program run by U.S. Sub 1, and (ii) if so, whether Individual 1 should raise this defense in a motion to dismiss. At trial, Individual 1 would have a viable argument that he withdrew from any alleged conspiracy because he left U.S. Sub 1 and returned to his home country before the applicable limitations period began. That fact-dependent defense, however, likely would not be successful if raised in a pre-trial motion to dismiss.

This memorandum reflects our current understanding of the facts and is focused on case law from the Sixth Circuit and the Second Circuit because those are the jurisdictions where Individual 1 faces the greatest risk. Likely outcomes could change in response to changing facts and circumstances, and we will update this memorandum accordingly. This memorandum is therefore not exhaustive, and the analyses and conclusions contained herein are subject to assumed facts and information that we have collected and reviewed thus far.

II. Relevant Facts

A. Individual 1

Individual 1 is an engineer who specializes in the calibration of certain machine parts. For most of the alleged conspiracy period, Individual 1 worked for a foreign subsidiary (“Foreign Sub 1”) of Company 1. Individual 1 began working for Foreign Sub 1 in 2008 in Foreign Country 1; in 2010, he moved to the United States to work for U.S. Sub 1 as a project manager with the team that was developing and calibrating a new type of machine part (“Part 1”). In this role, Individual 1 assisted Company 1 in preparing certification documentation necessary to obtain U.S.-regulatory approval for Part 1. Individual 2, Individual 3, and Individual 4 all worked with Individual 1 on the Part 1 team at U.S. Sub 1.

In 2013, Individual 1 left the group he had been working with in the United States and returned to Foreign Country 1 to work for a different foreign subsidiary (“Foreign Sub 2”) of Company 1. Individual 1 chose to leave his role at U.S. Sub 1 because he did not like the work culture in the United States and he wanted to move closer to his then-girlfriend, who was living in his home country. In his new role at Foreign Sub 2, Individual 1 no longer worked on Part 1. Individual 1’s new duties instead related to timelines, cost of production, and other matters related to other types of machine parts wholly unrelated Part 1. After he moved back to Foreign Country 1, Individual 1 had virtually no contact with any of his former co-workers at U.S. Sub 1, with the exception of limited personal communications, such as congratulations about births, weddings, and birthdays.

B. The Alleged Conspiracy

A grand jury returned an Indictment in 2019 and a Superseding Indictment in 2021 charging Individuals 2, 3 and 4 with, among other things, conspiracy to defraud the United States and violate the [redacted federal statute] pursuant to 18 U.S.C. § 371 in connection with their work for U.S. Sub 1 on Part 1. The Superseding Indictment referred to Individual 1 as a co-conspirator but did not formally charge him with any crimes.

The Superseding Indictment alleges that, from 2010 through 2017, the co-conspirators knowingly, intentionally, and willfully conspired to defraud the United States by (1) obstructing the functions of a federal agency of implementing and enforcing certain standards for Part 1 under the [redacted federal statute], and (2) by making false statements, representations, and certifications in documents related to Part 1 that were required to be filed and maintained pursuant to the [redacted federal statute]. The alleged purposes of this conspiracy were to enable Company 1 to obtain regulatory approval to sell Part 1 in the United States and, as a direct result, to enrich the co-conspirators through the continued receipt of compensation and other benefits. The limitations period for this offense is five years. 18 U.S.C. § 3282; *United States v. Berger*, 224 F.3d 107, 118–19 (2d Cir. 2000).

III. Analysis

A. Withdrawal Defense

(1) *Governing Law*

To establish a statute-of-limitations defense based on withdrawal from a conspiracy, a defendant must show that he took affirmative action to defeat or disavow the purpose of the

conspiracy before the applicable limitations period began. *United States v. Lash*, 937 F.2d 1077, 1083 (6th Cir. 1991); *United States v. Battista*, 646 F.2d 237, 246 (6th Cir. 1981); accord *Smith v. United States*, 568 U.S. 106, 111 (2013) (withdrawal is a complete defense to a conspiracy charge when the withdrawal occurs before the statute of limitations period). The defendant bears the burden of establishing if, and when, he withdrew from a conspiracy. *Smith*, 568 U.S. at 109–110; *Lash*, 937 F.2d at 1083.

A defendant effectively withdraws from a conspiracy where he (i) resigned from the business enterprise, (ii) made clear to his co-conspirators that he resigned, (iii) took no subsequent steps in furtherance of the conspiracy, and (iv) relinquished any claim to subsequent profits. *United States v. Nerlinger*, 862 F.2d 967, 974–75 (2d Cir. 1988); see *United States v. Goldberg*, 401 F.2d 644, 648–49 (2d Cir. 1968). A defendant who withdraws from a conspiracy “must not make any subsequent acts to promote the conspiracy” and “must not receive any additional benefits from the conspiracy.” *United States v. Berger*, 224 F.3d 107, 118–19 (2d Cir. 2000); accord *United States v. Smith*, 197 F.3d 225, 228 (6th Cir. 1999) (withdrawal defense is only viable if the defendant did not take any overt acts in furtherance of a conspiracy within the limitations period). Resignation alone may be insufficient to establish withdrawal where the act of resigning furthered the conspiracy, there was no effort to notify the victims or otherwise outwardly renounce the conspiracy, and the defendant lied about the conspiracy to law enforcement. *Id.*; *United States v. Bucio*, 857 F. App’x 217, 220 (6th Cir. 2021) (defendant did not present sufficient evidence of withdrawal from a conspiracy where he stated only that he left Kentucky and went back to California).

(2) *Application*

Individual 1 has a viable argument that he withdrew from the alleged conspiracy at U.S. Sub 1 in 2013—*i.e.*, more than five years before the original Indictment was returned in 2019—because, at that point, he voluntarily resigned from his position at U.S. Sub 1, made clear to his co-conspirators that he had resigned, took no subsequent steps in furtherance of the conspiracy and relinquished any claim to subsequent profits.

Individual 1 unquestionably disavowed the conspiracy when he resigned from his position at U.S. Sub 1 in 2013. When he did so, Individual 1 left the United States altogether to move back to Foreign Country 1, and he joined an entirely different subsidiary of Company 1 that had nothing to do with Part 1. Although some courts have held that merely moving from one U.S. state to another is insufficient to establish withdrawal from a conspiracy, *see, e.g., Bucio*, 857 F. App'x at 220, Individual 1 did much more than that—he moved to another continent and simultaneously left the U.S.-based program that is the focus of the alleged conspiracy. As a result of these actions, Individual 1 foreclosed his continuing role in any conspiracy related to obtaining U.S. regulatory approval for Part 1 that may have continued at U.S. Sub 1 in his absence.

When he left U.S. Sub 1, Individual 1 also relinquished any claim to subsequent profits from any conspiracy related to Part 1 and took no subsequent steps in furtherance of that conspiracy. Because Individual 1 no longer worked for U.S. Sub 1 after 2013, he was not a part of the legal entity that would have benefitted from the conspiracy during the limitations period; he had no interactions with U.S. Sub 1 or the program working on Part 1; he was no longer working towards obtaining U.S. regulatory approval for Part 1; and his compensation and other employment benefits were not tied to the success of Part 1. In other words, in 2013, Individual 1 relinquished any claim

to professional advancement tied to the success of the alleged conspiracy because he no longer worked for the legal entity that would have benefitted from it.

This case is substantially similar to the successful withdrawal defenses offered in *United States v. Nerlinger* and *United States v. Goldberg*. In *Nerlinger*, the court found that the defendant effectively withdrew from the conspiracy when he resigned from his position at the company and closed the account used to perpetuate the fraud, thereby relinquishing his claim to any subsequent profits and making that known to his co-conspirator. 862 F.2d at 974–75. Similarly, in *Goldberg*, the court found that the defendant effectively withdrew from the conspiracy when he resigned from his position, sent letters to all his customers informing them of his departure, informed his co-conspirators of his departure, and took no further action in furtherance of the conspiracy. 401 F.2d at 648-49. Here, like the defendant in *Nerlinger*, Individual 1 resigned from his position at U.S. Sub 1, definitively cutting off his involvement in the program that is the focus of the Superseding Indictment’s conspiracy charge. Like the defendant in *Goldberg*, Individual 1 also communicated his resignation to his co-conspirators by informing them that he was leaving U.S. Sub 1 and moving back to Foreign Country 1, effectively making clear to his co-conspirators that Individual 1 no longer wanted to participate in any conspiracy related to Part 1 and no longer wished to work at U.S. Sub 1.

We expect that the government will argue that Individual 1 did not unquestionably disavow the conspiracy or make his withdrawal clear to his co-conspirators because he maintained some communications with his former U.S. Sub 1 co-workers. But that argument is surmountable. Based on our current review of the communications, Individual 1’s post-2013 contact with individuals at U.S. Sub 1 was limited to personal communications with no impact whatsoever on

the objects of the purported conspiracy—that is, obtaining U.S. regulatory approval for Part 1 and enriching the employees of U.S. Sub 1 as a result.

B. Withdrawal Defense Raised in Motion to Dismiss

(1) *Governing Law*

A defendant may raise a statute of limitations defense in a pre-trial motion to dismiss an indictment. *United States v. Bucheit*, 134 F. App'x. 842, 849–50 (6th Cir. 2005). Indeed, there is some authority in the Sixth Circuit that suggests that a defendant *must* raise a statute of limitations defense in a pretrial motion or risk waiving the defense at trial. *United States v. Collake*, 134 F.3d 372, 1998 WL 25007, at *5 (6th Cir. 1998) (unpublished); *cf. United States v. Del Percio*, 870 F.2d 1090, 1093 (6th Cir. 1989) (criminal statutes of limitations are “waivable affirmative defenses”). Withdrawal-based statute-of-limitations, however, present difficulties on a motion to dismiss because they tend to require judicial factfinding, a task courts rarely undertake before trial. *United States v. Nazzal*, No. 11-20759, 2012 WL 4838996 (E.D. Mich. Oct. 11, 2012) (whether an alleged overt act is in furtherance of the central objective of the conspiracy is ultimately a question of fact for the jury); *see also United States v. Bergman*, 852 F.3d 1046, 1064 (11th Cir. 2017) (withdrawal defense turns on who the jury believes). That said, courts are permitted to make preliminary findings of fact necessary to decide questions of law presented by pretrial motions, such as whether a particular charge is barred by the statute of limitations, provided that the trial court’s findings do not “invade the province of the ultimate factfinder.” *United States v. Craft*, 105 F.3d 1123, 1126 (6th Cir. 1997).

(2) *Application*

If Individual 1 were indicted, we could raise a statute of limitations defense in a motion to dismiss. As explained above, we could argue that because Individual 1 clearly withdrew from the conspiracy in 2013, the statute of limitations for his role in the conspiracy ran in 2018, one year before the grand jury returned the original Indictment. We could argue that any subsequent overt act in furtherance of the conspiracy by Individual 2, Individual 3, or Individual 4 that occurred within the limitations period of 2014 to 2019 would not extend the statute of limitations period for Individual 1, because Individual 1 had already withdrawn at that point. *Smith v. United States*, 568 U.S. 106, 111 (2013) (“[w]ithdrawal terminates the defendant’s liability for postwithdrawal acts of his co-conspirators”).

It may be difficult, however, to prevail on a withdrawal defense in a pretrial motion because Individual 1’s defense turns on fact-bound questions. For example, Individual 1’s withdrawal defense may raise questions such as when, and under what circumstances, he left U.S. Sub 1, how extensive were his communications with U.S. Sub 1 employees after 2013, how was he compensated by Company 1 after 2013, and whether he ever traveled back to the United States after 2013. We could argue that the fact issues underlying Individual 1’s statute of limitations defense is easily separable from the merits, and thus susceptible to pretrial judicial factfinding, because that defense turns only on whether Individual 1 took any actions in furtherance of the conspiracy during or after 2014. *Craft*, 105 F.3d at 1127 (finding that the facts relating to the disposition of the statute of limitations issue are stated in the indictment or constitute preliminary facts easily isolated from the issues on the merits. These facts are essentially undisputed and raise a legal issue, not a factual one). But because Individual 1’s withdrawal defense turns on fact

specific questions on whether he effectively withdrew from a conspiracy and when, it may be difficult to prevail on a withdrawal defense in a pretrial motion.

Applicant Details

First Name	Gabriel
Last Name	Scavone
Citizenship Status	U. S. Citizen
Email Address	gscavone@law.gwu.edu
Address	<div> Address Street 1771 N. Pierce St., Apt. 1817 City Arlington State/Territory Virginia Zip 22209 </div>
Contact Phone Number	407-620-3670

Applicant Education

BA/BS From	Rollins College
Date of BA/BS	May 2020
JD/LLB From	The George Washington University Law School
	https://www.law.gwu.edu/
Date of JD/LLB	May 1, 2023
Class Rank	20%
Law Review/Journal	Yes
Journal(s)	The George Washington Law Review
Moot Court Experience	Yes
Moot Court Name(s)	Van Vleck Constitutional Law Moot Court

Bar Admission**Prior Judicial Experience**

Judicial Internships/ Externships	Yes
--------------------------------------	------------

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Gutman, Jeffrey
jgutman@law.gwu.edu
202-994-5797

Pollack, Charles
pollackc@law.gwu.edu

Byron, Paul
paul_g_byron@flmd.uscourts.gov
407-496-3792

This applicant has certified that all data entered in this profile and any application documents are true and correct.

GABRIEL SCAVONE

1771 N Pierce St, Arlington, VA 22209 • (407) 620-3670 • gscavone@law.gwu.edu

June 18, 2023

The Honorable Kiyo Matsumoto
United States District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto,

I am a graduate of The George Washington University Law School and am writing to apply for a judicial clerkship with you for the 2025–2026 term.

I am well equipped to contribute to your chambers and assist in the management of your docket. I have honed precise legal writing and technical editing skills through my experience as Senior Managing Editor of *The George Washington Law Review* and while serving as a judicial intern for two federal judges. I am detail-oriented, a hard-working former student athlete, and am eager to learn under your guidance.

Upon completion of the D.C. Bar examination, I will be working fulltime as a litigation associate in the Washington D.C. office of Steptoe & Johnson LLP until the beginning of the clerkship term.

Accompanying this letter, please find a resume, transcripts, and writing sample. Please also find recommendations from Professor Gutman, Professor Pollack, and the Honorable Paul G. Byron. Thank you for your consideration.

Respectfully,



Gabriel Scavone

GABRIEL SCAVONE

1771 N Pierce St., Apt. 1817, Arlington, VA 22209 • (407) 620-3670 • gscavone@law.gwu.edu

EDUCATION

The George Washington University Law School

Washington, D.C.

J.D., cum laude

May 2023

GPA: 3.603 Class Rank: 142/526

Activities: *The George Washington Law Review*, Senior Managing Editor, Volume 91; Alternative Dispute Resolution Board, Member; Van Vleck Moot Court Competition; GW Law Softball

Honors: Spanogle Commercial Arbitration Competition, Best Brief Award; Dean's Pro Bono Service Award; Presidential Volunteer Service Award

University of Miami School of Law

Coral Gables, FL

J.D. Candidate – Completed 1L Year

August 2020 – May 2021

GPA: 3.628 Class Rank: Top 17%

Honors: Dean's Merit Scholarship Recipient; Dean's List Spring 2021

Rollins College

Winter Park, FL

B.A. in Philosophy; Minor in Political Science, cum laude

May 2020

Activities: Student Athlete – Rollins College Men's Varsity Baseball Team

Honors: Athletic Conference Honor Roll (four semesters); Dean's List (four semesters)

EXPERIENCE

The Jacob Burns Community Legal Clinics, Public Justice Advocacy Clinic

Washington, D.C.

Student Attorney

January 2023 – May 2023

- Represented indigent clients in wage and unemployment compensation matters
- Negotiated two settlements with opposing counsel and achieved settlement on behalf of clients

The George Washington Law Review

Washington, D.C.

Senior Managing Editor, Volume 91

March 2022 – May 2023

- Reviewed and completed substantive and technical edit of entire law review issue before publication

Steptoe & Johnson LLP

Washington, D.C.

Summer Associate

June 2022 – August 2022

- Analyzed caselaw and provided team with memoranda to assist in litigation planning, including analysis of fair use affirmative defense in a copyright infringement case, and the Fifth Amendment privilege
- Evaluated police brutality cases as part of firmwide pro bono project

United States Court of Federal Claims

Washington, D.C.

Judicial Intern to The Honorable Marian B. Horn

January 2022 – April 2022

- Drafted orders and memoranda pertaining to Tucker Act Jurisdiction and attorney's fees

United States District Court for the Middle District of Florida

Orlando, FL

Judicial Intern to The Honorable Paul G. Byron

May 2021 – July 2021

- Attended court hearings and engaged in daily case discussions with Judge Byron
- Reviewed case records and drafted various orders, including an order on motions for summary judgment

INTERESTS

- Baseball; visiting every MLB park; hiking; paddleboarding; golf; running; trying new restaurants

54477408 Sex
Student ID

Scavone, Gabriel
1746 Fairview Shores Dr.
Orlando, FL 32804

UNIVERSITY
OF MIAMI



CORAL GABLES, FLORIDA 33124

06/29/2021

Academic Program
School of Law
Active in Program
Law

Beginning of Law Record

Fall 2020				
UM_Crs_ID	Course Title	Credits	Grade	Qty Pts
LAW 11	CIVIL PROCEDURE I Anthony Alfieri	3.000	A-	11.100
LAW 14	PROPERTY Andres Sawicki	4.000	A	16.000
LAW 15	TORTS Zanita Fenton	4.000	B	12.000
LAW 19	LEGAL COMM & RSCH I Jarrod Reich	2.000	B+	6.600
		Earned Credits	Graded Credits	Qty Pts
UM Semester GPA	3.515 UM Semester Totals	13.000	13.000	45.700
UM Cumulative GPA	3.515 UM Cumulative Totals	13.000	13.000	45.700
Spring 2021				
UM_Crs_ID	Course Title	Credits	Grade	Qty Pts
LAW 12	CONTRACTS Andrew Dawson	4.000	A-	14.800
LAW 16	CRIMINAL PROCEDURE Scott Sundby	3.000	B+	9.900
LAW 17	U.S CONST LAW I Frances Hill	4.000	A-	14.800
LAW 29	LEGAL COMM & RSCH II Cheryl Zuckerman	2.000	A	8.000
LAW 320	SUBSTANTIVE CRIMINAL LAW Martha Mahoney	3.000	A	12.000
		Earned Credits	Graded Credits	Qty Pts
UM Semester GPA	3.719 UM Semester Totals	16.000	16.000	59.500
UM Cumulative GPA	3.628 UM Cumulative Totals	29.000	29.000	105.200

Term Honor: DEAN'S LIST

Law Career Totals		Earned Credits	Graded Credits	Qty Pts
UM Cumulative GPA	3.628 UM Cumulative Totals	29.000	29.000	105.200
Cumulative Transfer Totals		0.000		
Cumulative Combined Totals		29.000		

End of Law

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWID : G43417108
Date of Birth: 09-SEP

Date Issued: 24-MAY-2023

Record of: Gabriel Scavone

Page: 1

Student Level: Law
Admit Term: Fall 2021

Issued To: GABRIEL SCAVONE
GSCAVONE@LAW.GWU.EDU

REFNUM:4386553

Current College(s): Law School
Current Major(s): Law

Degree Awarded: J D 21-MAY-2023
With Honors

Major: Law

JD RANK: 142/526

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
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NON-GW HISTORY:

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
2020-2021 University of Miami				
LAW 6202	Contracts	4.00	TR	
LAW 6206	Torts	4.00	TR	
LAW 6208	Property	4.00	TR	
LAW 6210	Criminal Law	3.00	TR	
LAW 6212	Civil Procedure	3.00	TR	
LAW 6214	Constitutional Law I	4.00	TR	
LAW 6216	Fundamentals Of	2.00	TR	
LAW 6217	Lawyering I	2.00	TR	
LAW 6217	Fundamentals Of	2.00	TR	
LAW 6217	Lawyering II	3.00	TR	
LAW 6360	Criminal Procedure	3.00	TR	
Transfer Hrs: 29.00				
Total Transfer Hrs: 29.00				

GEORGE WASHINGTON UNIVERSITY CREDIT:

Fall 2021

Law School

Law

LAW 6209	Legislation And Regulation	3.00	B+	
LAW 6218	Prof Responsibility & Ethics	2.00	A-	
LAW 6250	Corporations	4.00	A-	
LAW 6400	Administrative Law	3.00	B+	
LAW 6657	Law Review Note	1.00	H	
Ehrs	13.00	GPA-Hrs	12.00	GPA 3.500
CUM	13.00	GPA-Hrs	12.00	GPA 3.500
Good Standing				
THURGOOD MARSHALL SCHOLAR				
TOP 16%-35% OF THE CLASS TO DATE				

***** CONTINUED ON NEXT COLUMN *****

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
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Spring 2022

Law School

Law

LAW 6236	Complex Litigation	3.00	A	
LAW 6280	Trangerud Secured Transactions	2.00	A	
LAW 6380	Constitutional Law II	4.00	A-	
LAW 6642	Smith Adr Competition	1.00	CR	
LAW 6657	(Spanogle) Johnson	1.00	H	
LAW 6657	Law Review Note	2.00	CR	
LAW 6668	Field Placement	2.00	CR	
LAW 6669	Mccoy Judicial Lawyering	2.00	B+	
LAW 6669	Smith	15.00	GPA-Hrs	11.00
Ehrs	15.00	GPA-Hrs	11.00	GPA 3.758
CUM	28.00	GPA-Hrs	23.00	GPA 3.623
Good Standing				
THURGOOD MARSHALL SCHOLAR				
TOP 16%-35% OF THE CLASS TO DATE				

Fall 2022

LAW 6230	Evidence	4.00	A	
LAW 6300	Salzburg Federal Income Taxation	3.00	A-	
LAW 6644	Bearer-Friend	1.00	CR	
LAW 6648	Moot Court - Van Vleck	2.00	A-	
LAW 6658	Negotiations	1.00	CR	
LAW 6658	Juni Law Review	3.00	B	
LAW 6683	College Of Trial Advocacy	14.00	GPA-Hrs	12.00
Ehrs	14.00	GPA-Hrs	12.00	GPA 3.611
CUM	42.00	GPA-Hrs	35.00	GPA 3.619
Good Standing				
THURGOOD MARSHALL SCHOLAR				
TOP 16%-35% OF THE CLASS TO DATE				

Spring 2023

LAW 6232	Federal Courts	4.00	B+	
LAW 6622	Public Justice Advocacy	6.00	A-	
LAW 6652	Clinic	2.00	A-	
LAW 6652	Legal Drafting	1.00	CR	
LAW 6658	Law Review	13.00	GPA-Hrs	12.00
Ehrs	13.00	GPA-Hrs	12.00	GPA 3.556
CUM	55.00	GPA-Hrs	47.00	GPA 3.603
***** CONTINUED ON PAGE 2 *****				



Katie Cloud
Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G43417108
Date of Birth: 09-SEP
Record of: Gabriel Scavone

Date Issued: 24-MAY-2023

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
***** TRANSCRIPT TOTALS *****				
	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	55.00	47.00	169.33	3.603
TOTAL NON-GW HOURS	29.00	0.00	0.00	0.00
OVERALL	84.00	47.00	169.33	3.603
***** END OF DOCUMENT *****				

This transcript processed and delivered by Parchment



Katie Cloud
Katie Cloud
Interim University Registrar

Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

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DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students.
700s	School of Business – Limited to doctoral students. The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and

School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit <http://go.gwu.edu/corcorantranscriptkey>

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
CU	Catholic University of America	NVCC	Northern Virginia Community College
GC	Gallaudet University	PGCC	Prince George's Community College
GU	Georgetown University	SEU	Southeastern University
GL	Georgetown Law Center	TC	Trinity Washington University
GMU	George Mason University	USU	Uniformed Services University of the Health Sciences
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; B, Good; C, Satisfactory; D, Low Pass; F, Fail; I, Incomplete; IPG, In Progress; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; P, Pass; NP, No Pass; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the I is replaced by the final grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.

Effective Fall 2003: The grading symbol R indicates need to repeat course.

Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade.

Effective Fall 1987: The following grading symbols were added: A-, B+, B-, C+, C-, D+, D-. Effective Summer 1980: The grading symbols: P, Pass, and NP, No Pass, replace CR, Credit, and NC, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) A, Excellent; B, Good; C, Minimum Pass; F, Failure; I, Incomplete; IPG, In Progress; CR, Credit; W, Authorized Withdrawal; Z, Unauthorized Withdrawal; AU, Audit. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

Effective Fall 1994: The following grading symbols were added: A-, B+, B-, C+, C- grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; B+, B, B-, Good; C+, C, C-, Passing; D, Minimum Pass; F, Failure; CR, Credit; NC, No Credit; I, Incomplete. When a grade is assigned to a course that was originally assigned a grade of I, the grade is replaced with I and the grade. Through Summer 2014 the I was replaced with I and the final grade.

M.D. Program Grading System

H, Honors; HP, High Pass; P, Pass; F, Failure; IP, In Progress; I, Incomplete; CN, Conditional; W, Withdrawal; X, Exempt; CNP, Conditional converted to Pass; CNF, Conditional converted to Failure. Through Summer 2014 the I was replaced with I and the final grade.

For historical information not included in the transcript key, please visit

<http://www.gwu.edu/transcriptkey>

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June 18, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Mr. Gabriel Scavone was a student in my Spring, 2023 Public Justice Advocacy Clinic. Under my supervision, the Clinic serves low-income residents of the D.C. metropolitan area and represents non-profit organizations in civil litigation and administrative cases. Students attend a weekly seminar to learn the substantive law of wage and hour cases and unemployment compensation as well as the necessary legal skills to represent clients. Under my guidance, students interview clients, draft litigation documents and, as necessary, advocate before judges.

Mr. Scavone, the Senior Managing Editor of the George Washington University Law Review, did an excellent job in the Clinic. He has the intelligence, skills, and research and writing abilities to be a very fine clerk.

What struck me first about Mr. Scavone was his eagerness to dive into his cases and his dogged approach to legal research and writing. He took to the practice of law like a duck to water. Approaching his work with curiosity, creativeness and real joy, he prepared diligently for his client interviews and relished the chance to research the resulting issues.

At the beginning of the semester, I assigned him and a partner to a FOIA matter in which the federal agency failed to respond to our client's FOIA request. Mr. Scavone and his partner researched the applicable law, organized the relevant facts and drafted an excellent federal complaint despite never having previously written one. A fine writer, his prose is clear and precise, and he exercised excellent judgment in deciding what facts to include in the complaint.

I also assigned Mr. Scavone and a partner to a tricky wage and hour matter in which our client claimed not to have received accrued time off payments after she was terminated from her job due to COVID. After a productive interview, Mr. Scavone and his partner worked with the client to untangle the employer's very complicated policy on point. They were able to figure it out more quickly than I was, and the students concluded that the employer did not follow its policy or applicable DC law. Despite the lack of caselaw on point, Mr. Scavone and his partner developed two creative claims and, under some time pressure, drafted a complaint challenging the employer's failure to make the required pay-out to our client. At the same time, he and his partner worked diligently to turn their legal theories into a demand letter which sought a sum certain in damages for our client. Persistently navigating through the employer's bureaucracy, Mr. Scavone identified the right attorney to contact, and he led the team in negotiating a favorable settlement. In fact, Mr. Scavone continued working on the case well after the semester had ended.

Mr. Scavone replicated that success with another wage claim case involving a client who was taken off the work calendar because of an error made by the employer. Mr. Scavone and his partner interviewed the client, who was effectively unemployed for weeks. Here again the facts were complicated, and Mr. Scavone led the team in asking for information from several DC government agencies. Again, he and his partner developed a creative legal theory in support of their client's claim, wrote a well-drafted and persuasive demand letter and sent it to the employer. The employer responded by agreeing to a full-money settlement.

Last, I assigned Mr. Scavone and another partner to an unemployment compensation appeal. That case required them to understand the intricacies of what the client did for a contractor to the local airport and what it accused the client of having done wrong. Mr. Scavone's lengthy memorandum setting forth those facts served as the roadmap of the team's advocacy effort. Ultimately, the employer did not appear at the hearing, but Mr. Scavone and his partner were extremely well-prepared for the hearing.

During our supervision meetings, Mr. Scavone was always well-prepared and actively engaged. He enjoyed debating the pros and cons of various legal theories and was very good at it. Although he developed his own views, he remained open-minded and modified his approach when faced with persuasive points from me or other students. He was eager to learn and to practice the practical aspects of lawyering – interviewing, fact finding and negotiations – for example. And he came to excel at each.

In short, Mr. Scavone has all the makings of an excellent judicial law clerk. He is very bright, an excellent researcher and writer and works very well with his colleagues. He is diligent, but careful and thorough. During our many supervision meetings, he was consistently well-prepared. His outstanding legal skills directly contributed to victories for clients who relied on his sound judgment, counsel and skills. I highly recommend him as a judicial law clerk.

Please do not hesitate to contact me at 202-994-5797 if there is any additional information I may provide.

Sincerely,

Jeffrey S. Gutman
Professor of Clinical Law

Jeffrey Gutman - jgutman@law.gwu.edu - 202-994-5797

The George Washington University Law School
2000 H Street NW
Washington, DC 20052

June 18, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing this recommendation letter on behalf of Mr. Gabriel “Gabe” Scavone who I understand is applying for a federal clerkship position. I am well qualified to speak on Mr. Scavone’s legal research, writing, and oral communication skills as he enrolled in my scholarly writing course for the 2021-22 academic year.

Mr. Scavone is both a good writer and diligent researcher. He communicates clearly and effectively, without needing a prompt to offer a response. It is plainly obvious that Mr. Scavone cares about his work and is thoughtful in its completion. Mr. Scavone is professional in his demeanor and responds well to feedback, both positive and critical. Most importantly, he applies the feedback to improve his work product.

As an example, Mr. Scavone was tasked with drafting an 8,000-word Note to complete the scholarly writing course. Mr. Scavone chose to write about police accountability following the US Supreme Court’s decision in *Devenpeck v. Alford*. Specifically, Mr. Scavone argued that the *Devenpeck* decision fosters police unaccountability because it unfairly denies recourse to plaintiffs who are arrested without probable cause for the crime identified by a police officer at the time of arrest. Mr. Scavone’s final Note was exceptional as compared to his peers. Mr. Scavone received the highest grade in the class on this assignment after he thoughtfully drafted and revised it. Mr. Scavone asked me pointed questions throughout the process to tailor his research so the final product answered a legal problem with a precise legal solution. I encourage you to review this submission if Mr. Scavone elects to provide it.

Mr. Scavone is a person who I always knew prepared for class and would actively participate. Mr. Scavone frequently volunteered answers to posed questions or in response to his classmates. Mr. Scavone’s classroom performance and overall demeanor helped him to achieve the position as Senior Managing Editor on *The George Washington Law Review* for the 2022-23 academic year. I am extremely confident that Mr. Scavone will serve as a tremendous resource for authors drafting scholarly articles next academic year.

Ultimately, I think Mr. Scavone will thrive in any environment that requires collaboration with others, like a federal clerkship position. Mr. Scavone will do well in assisting his judge to draft any document required or to perform thorough legal research. Mr. Scavone has insightful views to share and I know he will actively contribute as a judicial clerk.

Sincerely,
Charles R. Pollack
Associate General Counsel
Professorial Lecturer in Law

Charles Pollack - pollackc@law.gwu.edu



UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Honorable Paul G. Byron
401 W. Central Blvd., Suite 4650
Orlando, Florida 32801
(407) 835-4321

June 21, 2022

Re: Letter of Recommendation
Mr. Gabriel Scavone


Dear Sir or Madam,

I am writing to recommend Mr. Scavone for your consideration. Mr. Scavone worked as a legal intern in my chambers during the summer of 2021. Summer interns assist my term law clerks with legal research, attend jury trials, and observe a variety of hearings. Additionally, I provide my summer interns the opportunity to draft an order on a dispositive motion. Mr. Scavone readily assumed responsibility for drafting an order on cross motions for summary judgement in a case involving alleged violations of § 1983. The order prepared by Mr. Scavone was exceptionally well-reasoned and resolved the case. This is a very impressive accomplishment particularly for a student who has just completed the first year of law school.

During the summer, I interacted with Mr. Scavone daily and found him to be a young man of exceptional character and intellect. He consistently comports himself with a maturity far beyond his years. Mr. Scavone is a well-rounded and very agreeable person, and it was a pleasure to have him in chambers for the summer. My only regret is that I do not have a term law clerk position available for 2023. I recommend Mr. Scavone to you without reservation, and I am confident he will make a valuable contribution to your office.

I am available at your convenience to discuss his many fine qualities and his candidacy should you desire additional information.¹

Sincerely,


PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

¹ Paul_G_Byron@flmd.uscourts.gov or (407) 835-4321.

GABRIEL SCAVONE

1771 N Pierce St., Apt. 1817, Arlington, VA 22209 • (407) 620-3670 • gscavone@law.gwu.edu

Writing Sample

The following writing sample is a portion of the moot court appellate brief that I prepared as part of the 2022 Van Vleck Constitutional Law Moot Court Competition at my law school. For brevity, I have included only a brief statement of the case and my argument section.

I represented the Respondent in this matter, the superintendent of elections of a fictional state, and addressed the procedural issue of whether the federal courts have jurisdiction to hear the Petitioner's constitutional challenge to a fictional state statute that allows voters to challenge the qualifications of candidates running for federal electoral office.

This writing sample reflects my sole work product and was not edited or reviewed by anyone else.

STATEMENT OF THE CASE

Pursuant to N.C. Gen Stat. § 107–18.3 (the “N.C. Challenge statute”), any qualified voter registered in the same district as a candidate for any elective office in the state may file a challenge that the Candidate does not meet the constitutional or statutory qualifications for the office. Petitioner, Sean O’Shaghnessy serves as the member of Congress for New Columbia’s sixth congressional district and filed a notice of candidacy for the upcoming general election on May 16, 2022. On May 20, 2022, three registered voters in the sixth congressional district filed a challenge under the N.C. Challenge statute to Petitioner’s candidacy with the N.C. Superintendent of Elections alleging that Petitioner had violated Section 3 of the Fourteenth Amendment by engaging in an insurrection. U.S. CONST. amend XIV, § 3. Voters assert that representative O’Shaghnessy either helped to plan the attack on January 6, or alternatively assisted those who did plan the January 6th attack, thereby disqualifying him from holding federal electoral office.

On May 24, 2022, Petitioner filed suit against the N.C. Superintendent of Elections in the District Court for the District of New Columbia, seeking to enjoin the state proceeding on the ground that the N.C. Challenge statute unconstitutionally permits New Columbia to make an independent evaluation of a candidate’s qualifications, which is allegedly a power exclusively given to the U.S. House of Representatives in Article I, Section 5 of the Constitution. The District Court set a hearing date for seven days before the hearing before the N.C. Superintendent of Elections was to take place. Respondent agreed to stay all proceedings until the District Court decided the case.

On June 1, 2022, Respondent filed a motion to dismiss, arguing that the state proceeding should proceed because Petitioner has no standing due to lack of injury, the claim is not ripe, and the federal court is precluded from interfering in the state matter. The District Court dismissed the

complaint without prejudice on June 15, 2022, finding the matter premature. *O’Shaghnessy v. Morgenthal*, No. 22-sy-0428933, 4–5 (D.D.N.C June 15, 2022).

Petitioner immediately appealed to the Court of Appeals for the Thirteenth Circuit. On July 26, 2022, the appellate court issued an order affirming the ruling of the district court’s dismissal of the case, finding that the case was premature and rejecting Petitioner’s argument that Article I, Section 5 is the exclusive means for determining eligibility to the House of Representatives. *O’Shaghnessy v. Morgenthal*, No. 22-1623556, 4 (13th Cir. July 26, 2022). Petitioner timely filed a petition for a writ of certiorari, which this Court granted on August 29, 2022.

ARGUMENT

I. THE FEDERAL COURTS DO NOT HAVE JURSDICTION UNDER ARTICLE III TO ADJUDICATE PETITIONERS CHALLENGE TO N.C. GEN. STAT. § 107–18.3

A. The Federal Courts Do Not Have Jurisdiction Under Article III Because Petitioner Has Not Suffered an Injury in Fact

Federal courts “do not possess a roving commission to publicly opine on every legal question.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Under Article III of the Constitution, a federal court’s jurisdiction is limited to “Cases” and “Controversies.” U.S. CONST. art. III, § 2. The Supreme Court has established three standing requirements as the “irreducible constitutional minimum.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a plaintiff must show (1) an injury in fact—i.e., that they have suffered a past or imminent injury; (2) a causal connection between the injury and the suffered harm; and (3) a likelihood that a favorable court ruling will redress the injury. *See id.* at 560–61.

At issue in this case is whether Petitioner suffered an injury in fact by being subjected to proceedings under the N.C. Challenge statute, which the Petitioner alleges is unconstitutional.

An injury in fact must be “concrete, particularized, and actual or imminent”—that is, “real, and not abstract.” *TransUnion*, 141 S. Ct. at 2203–04 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016)). This requirement ensures that plaintiffs have a “personal stake” in the case. *Id.* at 2203. It also ensures that the federal courts “do not adjudicate hypothetical or abstract disputes.” *Id.*

With those concerns in mind, a mere risk of future harm, without more, does not suffice. A claim of future injury qualifies as a concrete harm “if the threatened injury is ‘certainly impending,’ or there is a ‘substantial risk’ that the harm will occur.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citing *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 n.5 (2013)).

In the context of threatened enforcement of the law, “it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.” *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Still, to satisfy the injury in fact requirement based on threatened enforcement of the law, the plaintiff must allege: (1) “an intention to engage in a course of conduct arguably affected with a constitutional interest,” (2) that is “proscribed by a statute,” and (3) the existence of “a credible threat of prosecution thereunder.” *Susan B. Anthony List*, 573 U.S. at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

Here, the Petitioner has not alleged “an intention to engage in a course of conduct arguably affected with a constitutional interest.” *Id.* This is because Petitioner fails to allege that their *future* conduct will subject them to further proceedings under the N.C. Challenge statute. On the contrary, it is Petitioner’s *past* conduct of alleged participation in the January 6th insurrection that has subjected them to proceedings under the N.C. Challenge statute. Unless Petitioner intends to

engage in borderline unconstitutional conduct in the future that may subject them to further challenges to their candidacy under the N.C. Challenge statute, then they have not alleged a future course of conduct sufficient to meet the injury in fact standard as put forth in *Susan B. Anthony List*. *See id.*

Next, even if the Petitioner did allege that they intend to engage in future conduct that would subject them to further proceedings under the N.C. Challenge statute, such conduct would not be proscribed by the statute they wish to challenge. *Id.* The N.C. Challenge statute does not proscribe any conduct. The statute merely provides a unique vehicle for voters and the state of New Columbia alike to regulate their substantial interest in the candidates they place on the ballot. *See* N.C. Gen. Stat. § 107–18.3(a)–(e) (providing a mechanism for voters to challenge candidate qualifications, but not proscribing any particular candidate conduct).

Finally, there is no credible threat of prosecution under the N.C. Challenge statute for any future conduct. As the Court in *Susan B. Anthony List* put it, “[p]ast enforcement against the same conduct is good evidence that the threat of enforcement is not ‘chimerical.’” *Susan B. Anthony List*, 573 U.S. at 164 (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). There is no history of past enforcement in this case—Petitioner was not the subject of a complaint in past election cycles. And again, even if Petitioner was subject to past enforcement, Petitioner has failed to allege any course of future conduct that would subject them to similar proceedings.

This case is readily distinguishable from *Susan B. Anthony List*, in which the Petitioner and the dissent of the court of appeals below rely. In that decision, *Susan B. Anthony List*, a pro-life advocacy organization announced that it intended to put up a billboard asserting that Congressman Steven Driehaus supported taxpayer-funded abortion. *Id.* at 153–54. Driehaus filed a complaint with the Ohio Elections Commission alleging that *Susan B. Anthony List* violated Ohio’s

campaign laws by making false statements about his voting record. *Id.* at 154. Susan B. Anthony List responded by filing a complaint in federal district court, alleging that the Ohio law infringed upon its First Amendment rights. *Id.* The district court dismissed for lack of standing and ripeness and the Court of Appeals for the Sixth Circuit affirmed. *Id.* at 156. This Court reversed, holding that Susan B. Anthony List had standing to pursue their legal claims before the statute had been enforced against them—i.e., before they had put up the billboard that allegedly would have been prohibited under Ohio Law. *See id.* at 168.

The Court found that Susan B. Anthony List sufficiently asserted an injury in fact because: (1) petitioners plead specific statements that they intended to make in the *future* and intent to engage in substantially similar activity in the future, (2) the Ohio statute at issue arguably covered and proscribed the subject matter of petitioners’ intended *future* speech, and (3) there was a threat of future enforcement against petitioners because they were the subject of a complaint in a *past* election cycle. *Id.* at 161–63.

As described in detail, *supra* pp. 3–4, Petitioner has failed to allege that any of those conditions were met in this case. Petitioner has not alleged any future conduct that they intend to engage in that is arguably proscribed by the N.C. Challenge statute, or that any threat of future enforcement is more than merely conjectural due to past enforcement of the N.C. Challenge statute.

In sum, the threatened enforcement of the N.C. Challenge statute—even if administrative proceedings have begun—is not sufficiently imminent because Petitioner has failed to allege the existence of a future injury that is “certainly impending” or that there is “a substantial risk” that the harm will occur. *Susan B. Anthony List*, 573 U.S. at 158 (internal quotations omitted). For that reason, the Respondent respectfully requests that this Court affirm the decision of the court of appeals below dismissing Petitioner’s case for lack of Article III standing.

B. The Federal Courts Do Not Have Jurisdiction Under Article III Because Petitioner’s Challenge is Not Ripe for Review

In addition to featuring a plaintiff that has a proper stake in the litigation, constitutionally valid cases or controversies under Article III of the Constitution must come at the right time—that is, federal courts cannot consider constitutional issues prematurely. “Ripeness thus responds to a separation of powers concern by postponing judicial intervention until it is clear a dispute exists that can and should be resolved by a court.” WILLIAM D. ARAIZA, UNDERSTANDING CONSTITUTIONAL LAW, 61 (5th ed. 2020).

The ripeness inquiry is twofold: First, the court must evaluate whether the issue in question is fit for judicial review at the time the suit is brought, and second, the court must evaluate the hardship to the parties that would ensue if judicial review were delayed. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Fitness for review turns on whether the claim relies on facts that are still contingent, or whether the issue presents questions that are “purely legal, and will not be clarified by further factual development.” *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985). The hardship factor is prudential and requires an equitable consideration of the hardship that would occur if prompt judicial review were delayed. *See, e.g., Susan B. Anthony List*, 573 U.S. at 167.

The doctrines of standing and ripeness both originate from the same Article III limitations, and thus, the Court has increasingly recognized that the standing and ripeness often “boil down to the same question.” *Id.* at 157 n.5 (internal quotations omitted) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128, n.8 (2007)). As discussed, *supra* Section I.A, Petitioner has failed to allege an injury in fact sufficient to support Article III standing. This consideration weighs in favor of there being a lack of ripeness in this case as well. *See Susan B. Anthony List*, 573 U.S. at 157 n.5.

But even if Petitioner had alleged a sufficient injury in fact, this case is still not ripe for adjudication by the federal courts. Concededly, Petitioner’s challenge to the N.C. Challenge statute may present an issue that is legal in nature—i.e., whether the N.C. Challenge statute conflicts with Article I, Section 5 of the Constitution. Even so, Petitioner has failed to adequately allege that they will suffer hardship if prompt judicial review by the federal courts were to be delayed.

The denial of prompt judicial review by the federal courts would not impose hardship on Petitioner because it would not force Petitioner to change the course of their future conduct. *See id.* at 167–68. Petitioner still intends to run for office and will have adequate opportunity in the New Columbia administrative hearing¹ and the state courts of New Columbia (if Petitioner is subject to an adverse decision) to establish that they did not violate the constitution, as well as challenge the constitutionality of the New Columbia statute.²

It is true that this Court has found that a reasonable threat of prosecution and the actual filing of an administrative action threatening sanctions may give rise to a ripe controversy. *See Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 625–26 n.1 (1986). Similarly, here, an administrative action threatening to disqualify Petitioner from office has already commenced. Additionally, the potential consequences of an adverse ruling by the N.C. Superintendent of Elections are great—namely, that Petitioner will be disqualified from running from office.

That said, Petitioner has not yet been subject to an adverse ruling by the N.C. Superintendent of Elections. And, moreover, Petitioner failed to respond to any motions or

¹ *See* N.C. Gen. Stat. § 107–18.4(a)–(c) (describing procedure for administrative hearing conducted by the New Columbia Superintendent of Elections on an accelerated schedule).

² *See* N.C. Gen. Stat. § 107–18.6 (allowing for appeals of any final decision of the Superintendent under §107–18 directly to the New Columbia Supreme Court).

discovery requests in the upcoming administrative hearing before filing suit in federal court. The ultimate hardship that Petitioner may suffer as a result of the threatened enforcement of the N.C. Challenge statute is thus too conjectural and too far removed for the federal courts to intervene before these issues are hashed out in the state courts of New Columbia through the expedited process provided for in the N.C. Challenge statute. In short, it is simply too early for Petitioner to pursue their claim in the federal courts, even if an administrative action threatening to disqualify petitioner from office has already commenced in its early stages.

For the aforementioned reasons, Petitioner’s claim is not ripe for review by the federal courts, and the Respondent respectfully requests that this Court affirm the court of appeals dismissal of Petitioner’s case for lack of Article III standing.

C. The Federal Courts Should Abstain From Interfering With the Ongoing New Columbia Proceedings

“Our Federalism,” Justice Black famously wrote, envisions “a system in which there is sensitivity to the legitimate interests of both State and National Governments,” and “in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.” *Younger v. Harris*, 401 U.S. 37, 44 (1971).

With these concerns of federalism and comity in mind, the Supreme Court formed the *Younger* abstention doctrine, under which federal courts abstain from enjoining ongoing state-court proceedings that are criminal in nature or would otherwise interfere with an important interest in the state’s administration of its judicial system.³ *Id.* at 53. Even the possible unconstitutionality

³ *Younger* itself only addressed federal abstention with ongoing state criminal prosecution. *Younger* was later extended by the Court to civil judicial proceedings involving important state interests. *See Juidice v. Vail*, 430 U.S. 327, 335 (1977) (holding that the *Younger* abstention doctrine was applicable to a civil contempt proceeding where important state interest was implicated); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987) (holding that *Younger* abstention doctrine was applicable to state civil proceedings involving only private parties where an important state

of a statute on its face, the Court put it, does not warrant federal court interference with ongoing state proceedings, absent extreme circumstances. *Id.* at 54 (“[T]he possible unconstitutionality of a statute ‘on its face’ does not in itself justify an injunction against good-faith attempts to enforce it.”).

The Court in *Middlesex County Ethics Commission. v. Garden State Bar Ass’n*, 457 U.S. 423 (1982) devised a familiar three-pronged test to determine when *Younger* abstention is appropriate: (1) the state matter that is the purported basis for abstention must be an “ongoing state judicial proceeding,” (2) the ongoing state judicial proceeding must implicate “important state interests,” and (3) there must be an adequate opportunity in the state proceeding for the party resisting abstention to raise their constitutional challenge. *Middlesex*, 457 U.S. at 432. All three-prongs required for *Younger* abstention as laid out in *Middlesex* are easily met in this case.

First, the proceeding initiated by the N.C. Superintendent of Elections is ongoing. A final administrative decision has not been issued and state court appeals have not been exhausted. *See Huffman v. Pursue Ltd.*, 420 U.S. 592, 608 (1975) (concluding that *Younger* abstention was appropriate where the plaintiff had not yet exhausted state court appeals).

Second, that ongoing proceeding implicates the state of New Columbia’s important interest in regulating the qualification and eligibility of its political candidates. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (finding that states have “important regulatory interests” in enforcing state laws that govern “the selection and eligibility of candidates”); *Storer v. Brown*, 415 U.S. 724, 733 (1974) (recognizing that “a State has an interest, if not a duty, to protect the integrity of its

interest was implicated); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 431–32 (1982) (holding that the comity and federalism concerns underlying the *Younger* abstention doctrine mandated federal abstention despite the fact that the state bar proceedings at issue were purely administrative).

political processes from frivolous or fraudulent candidacies” (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972))).

And finally, there is adequate opportunity for Petitioner to raise their constitutional challenge in the state proceedings because the final decision of the N.C. Superintendent of Elections is immediately appealable to the New Columbia Supreme Court. *See* N.C. Gen. Stat. § 107–18.6; *see also Ohio Civil Rights Comm’n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986) (finding that “it is sufficient under *Middlesex* . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding”).

In the past, the *Younger* abstention inquiry would end here. But the Court has since defined the outer bounds of the *Younger–Middlesex* analysis in *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69 (2013). In that decision, Sprint filed a complaint with the Iowa Utilities Board (“IUB”) asking for a declaration that it was proper under federal law to withhold charges for certain intercarrier access fees from a telecommunications carrier for long-distance calls. *Sprint*, 571 U.S. at 73–74. The IUB held that federal law allowed non-Sprint providers to extract access charges for the Sprint-originated long-distance calls. *Id.* at 74. Sprint appealed the IUB decision to the Iowa state courts and also filed suit in federal district court seeking declaratory and injunctive relief against enforcement of the IUB order. *Id.* The lower federal courts found *Younger* abstention appropriate, and the Supreme Court granted certiorari. *Id.* at 75.

The Court reversed, clarifying that even if *Younger* abstention is appropriate under *Middlesex*, it applies in only three types of cases: (1) state criminal prosecutions; (2) civil enforcement proceedings; and (3) civil proceedings involving certain orders that are uniquely in furtherance of the state courts’ ability to perform their judicial functions. *Id.* at 78. The Court held that the IUB proceeding was not a *Younger*-eligible civil enforcement proceeding because it was,

at heart, a proceeding to resolve a private dispute rather than a proceeding initiated or pursued by the state in a sovereign or quasi-criminal capacity. *Id.* at 80. Here, the ongoing New Columbia proceeding is not a state criminal prosecution, so at issue is whether the proceeding falls under the second or third categories of cases required by *Sprint*.

According to the Court in *Sprint*, decisions applying *Younger* to civil enforcement proceedings under *Sprint*'s second category have "generally concerned state proceedings 'akin to a criminal prosecution' in 'important respects.'" *Id.* at 79 (citing *Huffman*, 420 U.S. at 604). The Court in *Sprint* explained that such enforcement proceedings are characteristically initiated by a state actor, who is routinely a party to the action, to sanction the federal plaintiff. *Id.* at 79.

Here, Petitioner's challenge qualifies as a *Younger*-eligible civil enforcement proceeding under *Sprint*'s second category. The ongoing New Columbia civil enforcement proceeding is sufficiently akin to a criminal prosecution to warrant *Younger* abstention because like a criminal prosecution, an adverse decision in the New Columbia civil enforcement proceeding carries serious constitutional penalties. More to the point, the ongoing civil enforcement proceeding is set to determine whether Petitioner participated in insurrection—a federal crime that Petitioner could also be criminally prosecuted for that would similarly render Petitioner incapable of holding federal electoral office. *See* 18 U.S.C. § 2383.⁴ Finally, the proceeding was initiated by the N.C. Superintendent of Elections, a state actor, and not private voters because under the N.C. Challenge statute, private voters themselves cannot initiate disqualification proceedings. *See* N.C. Gen. Stat. § 107–18.4(a)(1) (describing process for N.C. Superintendent of Elections to initiate administrative disqualification hearing after a challenge has been filed).

⁴ "Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States . . . shall be fined under this title or imprisoned not more than ten years, or both; and shall be incapable of holding any office under the United States."

Petitioner’s challenge also qualifies as a *Younger*-eligible “civil proceeding[] involving certain orders . . . that are uniquely in furtherance of the state courts’ ability to perform their judicial functions” under *Sprint*’s third category of cases. *Id.* at 78. Although no orders have been issued in the ongoing state enforcement proceeding, those orders are due to be issued soon under the expedited schedule provided for by the N.C. Challenge statute and would have already been issued had a stay not been granted pending these federal proceedings. Those orders will undeniably further the New Columbia state courts’ ability to perform their judicial functions because New Columbia has established a unique judicial process for reviewing the qualifications of its congressional candidates that cannot be performed if the federal courts wrongfully pass first judgment over those qualifications. Such an interference with New Columbia’s statutory scheme in adjudging the qualifications of its candidates goes too far in the other direction from *Younger*, such that the federal courts in exercising jurisdiction would “unduly interfere with the legitimate activities of the States.” *See Younger*, 401 U.S. at 44.

In sum, the ongoing New Columbia proceeding is *Younger*-eligible because the proceeding meets each of the three traditional *Middlesex* factors and qualifies both as a civil enforcement proceeding that is akin to a criminal prosecution and a civil proceeding that implicates the New Columbia state courts’ important interest in administering their judicial system. Accordingly, Respondent requests that this Court affirm the court of appeals decision to abstain from exercising jurisdiction over Petitioner’s federal claims under *Younger*. A holding otherwise would upset well-established principles of federalism and comity that underly *Younger* and destroy the efficacy of challenge statutes like that of New Columbia’s.

Applicant Details

First Name **David**
 Last Name **Scharf**
 Citizenship Status **U. S. Citizen**
 Email Address dscharf@jd23.law.harvard.edu
 Address

Address
Street
18 Robin Hill Road
City
Scarsdale
State/Territory
New York
Zip
10583
Country
United States

Contact Phone Number **9148743643**

Applicant Education

BA/BS From **Cornell University**
 Date of BA/BS **May 2019**
 JD/LLB From **Harvard Law School**
<https://hls.harvard.edu/dept/ocs/>
 Date of JD/LLB **May 25, 2023**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Harvard Civil Rights-Civil Liberties Journal**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/
 Externships **No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Lvovsky, Anna
alvovsky@law.harvard.edu

Charles, Guy-Uriel
gcharles@law.harvard.edu

Weinrib, Laura
lweinrib@law.harvard.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

DAVID R. SCHARF

18 Robin Hill Road, Scarsdale, NY 10583 | dscharf@jd23.law.harvard.edu |
(914) 874-3643

May 31, 2023

The Honorable Kiyo A. Matsumoto
United States District Court
Eastern District of New York
United States District Court for the New York Eastern District
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am writing to apply for a clerkship in your chambers for the 2025-26 term. I am a recent graduate of Harvard Law School, *cum laude*, and the former Co-President of the American Constitution Society. I am returning to New York City after law school and I would be extremely excited to clerk in Brooklyn.

Prior to law school, I performed in-depth policy research and drafted detailed reports for the presidential campaigns of Senator Cory Booker and Mayor Mike Bloomberg. In these positions, I synthesized vast amounts of information to inform messaging and strategy. During law school, I was a law clerk for the U.S. Select Subcommittee on the Coronavirus Crisis and a Summer Associate at Cleary Gottlieb, performing legal research and aiding litigation teams.

Attached are my resume, law school transcript, and writing sample. The writing sample is a memorandum for the Harvard Democracy and the Rule of Law clinic. It addresses issues federal courts face in applying federal or state law regarding defamation. Additionally, you will receive letters of recommendation from the following professors:

Prof. Laura Weinrib
Harvard Law School
lweinrib@law.harvard.edu
(617) 384-6180

Prof. Anna Lvovsky
Harvard Law School
alvovsky@law.harvard.edu
(617) 496-4253

Prof. Guy-Uriel Charles
Harvard Law School
gcharles@law.harvard.edu
(617) 998-1742

If there is any other information that would be helpful to you, I would be happy to provide it. Thank you for your time and consideration.

Sincerely,



David Scharf

DAVID R. SCHARF

18 Robin Hill Road, Scarsdale, NY 10583
dscharf@jd23.law.harvard.edu | (914) 874-3643

EDUCATION

Harvard Law School, Cambridge, MA

Juris Doctor, Cum Laude, May 2023

Honors: Dean's Scholar Prizes in Criminal Law, Evidence & Corporations

Activities: *Harvard Civil Rights-Civil Liberties Law Review*, Technical Editor, Subciter, Article Selection Board

American Constitution Society, Co-President & Programs Chair

Harvard Jewish Law Students' Association, Alumni Relations Chair

Cornell University, ILR School, Ithaca, NY

Bachelor of Science in Industrial and Labor Relations with Honors, Minor in Public Policy, May 2019

Senior Honors Thesis: "The Future of the Labor Movement"

Internships: BerlinRosen, Public Affairs Intern

Senator Kirsten Gillibrand, Legislative and Constituent Intern

EXPERIENCE

Cleary Gottlieb Steen & Hamilton, New York, NY

Summer Associate, May 2022-July 2022 (permanent offer extended)

Drafted detailed memoranda regarding complicated legal and factual issues to aid ongoing litigation.

Reviewed documents and transcripts to support deposition teams. Researched data privacy laws of various states to ensure clients were in compliance. Prepared in depth presentation on the processes for internal investigations in California. Substantively edited a brief for an immigration appeal to the 4th Circuit.

U.S. House Select Subcommittee on the Coronavirus Crisis, Washington, D.C.

Law Clerk, June 2021-August 2021

Analyzed implementation of federal programs and corporate responses to COVID-19. Composed legal memoranda on potential First Amendment challenges to congressional subpoenas. Reviewed documents produced by companies and federal agencies. Drafted question lines for members of Congress at hearings.

Mike Bloomberg 2020, New York, NY

Research Associate, February 2020-March 2020

Ensured accuracy and truthfulness in video and digital ads. Created rapid response materials, including policy memoranda on relevant political issues and transcripts of debates and media appearances.

Cory Booker 2020, Newark, NJ

Production Associate, Digital Mobilization Team, January 2020

Created impactful SMS and Facebook ads and peer-to-peer texting programs for fundraising and mobilization. Developed a long-term advertising strategy to organize supporters for the Iowa Caucus.

Research Fellow, June 2019-January 2020

Researched policy records of candidates using finance databases, lobbying disclosures and news aggregators to ensure the campaign possessed knowledge necessary to create and implement messaging. Vetted potential donors and other key people by examining social media and Nexis database.

INTERESTS

Yankees, cooking, cycling, news junkie, Marvel

Harvard Law School

Date of Issue: May 26, 2023
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Record of: David Ross Scharf
Current Program Status: Graduated
Degree Received: Juris Doctor May 25, 2023 Cum Laude
Pro Bono Requirement Complete

JD Program				2079	Evidence	H*	4
Fall 2020 Term: September 01 - December 31					Lvovsky, Anna		
					* Dean's Scholar Prize		
1000	Civil Procedure 1	P	4			Fall 2021 Total Credits:	12
	Rubenstein, William						
1001	Contracts 1	P	4			Winter 2022 Term: January 04 - January 21	
	Okediji, Ruth			2050	Criminal Procedure: Investigations	H	3
1006	First Year Legal Research and Writing 1A	H	2		Seo, Sarah		
	Bronsther, Jacob					Winter 2022 Total Credits:	3
1003	Legislation and Regulation 1	H	4			Spring 2022 Term: February 01 - May 13	
	Tarullo, Daniel						
1004	Property 1	H	4	2048	Corporations	H*	4
	Kelly, Daniel				de Fontenay, Elisabeth		
Fall 2020 Total Credits:				18	* Dean's Scholar Prize		
Winter 2021 Term: January 01 - January 22				8049	Democracy and the Rule of Law Clinic	H	3
1058	Leadership Fundamentals	CR	2	2928	Nadeau, Genevieve		
	Westfahl, Scott				Election Law	H	3
Winter 2021 Total Credits:				2	Charles, Guy-Uriel		
Spring 2021 Term: January 25 - May 14				2994	Legal Tools for Protecting Democracy and the Rule of Law in America	H	2
1024	Constitutional Law 1	H	4		Nadeau, Genevieve		
	Fallon, Richard					Spring 2022 Total Credits:	12
1002	Criminal Law 1	H*	4			Total 2021-2022 Credits:	27
	Yang, Crystal					Fall 2022 Term: September 01 - December 31	
	* Dean's Scholar Prize			2423	Human Rights and International Law	P	3
1006	First Year Legal Research and Writing 1A	P	2		Neuman, Gerald		
	Bronsther, Jacob			2142	Labor Law	P	4
3022	Law and Politics Workshop	P	2		Sachs, Benjamin		
	Stephanopoulos, Nicholas			2234	Taxation	H	4
1005	Torts 1	P	4		Abrams, Howard		
	Gersen, Jacob					Fall 2022 Total Credits:	11
Spring 2021 Total Credits:				16		Winter 2023 Term: January 01 - January 31	
Total 2020-2021 Credits:				36			
Fall 2021 Term: September 01 - December 03				2169	Legal Profession: Government Ethics - Scandal and Reform	P	3
2000	Administrative Law	P	4		Rizzi, Robert		
	Freeman, Jody					Winter 2023 Total Credits:	3
2035	Constitutional Law: First Amendment	H	4			Spring 2023 Term: February 01 - May 31	
	Weinrib, Laura			2453	Constitutional History II: From Reconstruction to the Civil Rights Movement	P	3
					Klarman, Michael		

continued on next page

Harvard Law School

Record of: David Ross Scharf

Date of Issue: May 26, 2023

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2086	Federal Courts and the Federal System Fallon, Richard	H	5	
3158	The Constitution and the First Congress Campbell, Jud	CR	1	
3213	The Law of Presidential Elections Schwartztoi, Larry	P	2	
		Spring 2023 Total Credits:	11	
		Total 2022-2023 Credits:	25	
		Total JD Program Credits:	88	
End of official record				

HARVARD LAW SCHOOL
 Office of the Registrar
 1585 Massachusetts Avenue
 Cambridge, Massachusetts 02138
 (617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

~~~~~  
**In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.**  
 ~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
 LL.M. (Master of Laws)
 S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.

May 2011 - Present

<i>Summa cum laude</i>	To a student who achieves a prescribed average as described in the <u>Handbook of Academic Policies</u> or to the top student in the class
<i>Magna cum laude</i>	Next 10% of the total class following <i>summa</i> recipient(s)
<i>Cum laude</i>	Next 30% of the total class following <i>summa</i> and <i>magna</i> recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67 (B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program

Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.

Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

<u>1969 to June 1998</u>	<u>General Average</u>
<i>Summa cum laude</i>	7.20 and above
<i>Magna cum laude</i>	5.80 to 7.199
<i>Cum laude</i>	4.85 to 5.799

June 1999 to May 2010

<i>Summa cum laude</i>	General Average of 7.20 and above (exception: <i>summa cum laude</i> for Class of 2010 awarded to top 1% of class)
<i>Magna cum laude</i>	Next 10% of the total class following <i>summa</i> recipients
<i>Cum laude</i>	Next 30% of the total class following <i>summa</i> and <i>magna</i> recipients

Prior Degrees and Certificates

LL.B. (Bachelor of Laws) awarded prior to 1969.

The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

May 31, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I'm thrilled to write in support of David Scharf as he applies for a clerkship in your chambers. David was a stand-out student in my Evidence course in the fall of 2021, in which he received a Dean's Scholar Prize. Based on his terrific contributions in class and on his truly excellent final exam, I have every confidence that he will be a terrific law clerk and a valuable asset to any chambers.

I run my Evidence class in a highly Socratic manner, calling on roughly half a 90-person class each session and soliciting volunteers on broader policy questions. Between David's thoughtful responses to cold-calls and his frequent contributions to our open-ended discussions, I had the opportunity to hear from him roughly two dozen times over the course of the semester. David acquitted himself masterfully in all our exchanges. Whether asked to assess the admissibility of a piece of evidence, to dissect the surprising downstream consequences of a seemingly straightforward rule, or to provide his own opinion on a legal dispute, David was well-prepared, thoughtful, and quick on his feet. He obviously came to class having read the materials carefully and considered the significance of each case, ready to answer thorny questions about dense judicial language or to critique the weaker points of a given opinion. A Socratic class invariably relies on its students to advance the project of learning, and quickly David emerged as one of my most reliable interlocutors—someone I could trust not only to provide the right answer, but also to express it crisply and cleanly for the rest of the class.

David also stood out for his willingness to engage difficult questions and positions, always ready to challenge the emerging consensus on an issue or to voice what he realized would be a minority position. I remember, for instance, a conversation of the merits of giving trial judges discretion to override the Rules of Evidence when they believe the demands of justice require it. Most students supported a more discretionary approach, emphasizing trial judges' greater flexibility and proximity to each case as a potential check on injustice. But David pushed back, conceding the benefits of judicial discretion while nevertheless emphasizing the structural biases that limit judicial reasoning (a point to which others were also sympathetic) and, more uniquely, the importance of legislative accountability and political responsiveness in crafting rules of evidence on culturally salient issues. The comment impressed me not only with its thoughtfulness and its recognition of the genuine equities on both sides, but also for David's willingness to defend a structural argument that is frequently unpopular with law students—and to do so, of course, in a thoughtful and measured way aimed at convincing even those who disagreed with him.

In light of David's performance in class, I was thrilled by his grade on the final exam. He received a Dean's Scholar Prize, reserved for a handful of the very top exams. He earned that grade both through his terrific responses to seven short issue-spotters and through an exceptional longer essay. My issue-spotters are deliberately written to be dauntingly difficult, each imbedding multiple issues with multiple doctrinal wrinkles. David's responses to each reflected a deep mastery of the rules, a keen attention to doctrinal wrinkles and the interactions between evidentiary provisions, and a meticulous eye for detail and factual complication. I was especially impressed by the sheer number of arguments and counterarguments he managed to fit in his responses, all within the high-pressure constraints of a timed exam.

David's essay response was even more impressive—one of the two top-scoring essays in the entire class. The prompt proposed a new amendment to the Federal Rules of Evidence allowing for the admission of "substantially necessary" defense-side evidence, pushing students to assess both the institutional imbalance between prosecutors and criminal defendants and the proper role of judges in mediating that imbalance. David's answer stood out immediately for the systematicity and clarity of its organization. Although many students surveyed the competing equities and practical effects of such a rule, David divided his essay into a series of crisply labeled and reasoned sections, beginning with the rule's pragmatic impact and then discussing its likely benefits, its costs, and his ultimate recommendation. David opened with the important insight that the proposal, despite its claims to change the operations of the Rules, was likely to have modest effect, because other evidentiary rules—as well as the innately discretionary nature of trial—already give judges profound latitude to admit evidence when they deem appropriate. The proposal, he suggested, was less a sea change than a formal suggestion for judges to take a more expansive approach to Due Process challenges like that in *Mississippi v. Chambers*. From there, David went on to discuss the proposal's advantages, including the relative effectiveness of statutory directives in bolstering judges' willingness to exercise already-existing discretion, and its costs, from efficiency and accuracy concerns to the cultural biases that shape judicial sympathies for different defendants. Overall, the essay was a tour de force, showcasing not only David's deep knowledge of the doctrinal and the institutional aspects of evidentiary law, but also his capacity for thinking about the law in ways both creative and systematic.

For all these reasons, I am thrilled to recommend David. He is an immense insightful doctrinal thinker, a flexible and creative legal analyst, a thoughtful and effective writer, and a sophisticated student of legal institutions. He will be an outstanding law clerk, and a credit to any chambers.

Sincerely,

Anna Lvovsky
Assistant Professor of Law
alvovsky@law.harvard.edu
617-496-4253

Anna Lvovsky - alvovsky@law.harvard.edu

May 31, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is my absolute pleasure to write this letter recommending David Scharf's application to clerk in your chambers. He has my highest recommendation. David is a tremendous student; smart, engaged, perceptive, and dedicated. He is equally a remarkable human. Consequently, I am happy to recommend him highly, enthusiastically, and without reservation for our nation's most competitive and prestigious federal clerkships.

David was a student in my Election Law Class. He was a very active participant and extremely insightful. Needless to say, he was always prepared. He sat to my right, two rows in, and I could always count on him to answer questions thoughtfully and with great nuance. He co-wrote an extremely impressive paper for my class. (Students had the option of writing alone or working with a partner; David chose the latter option). The paper was about mandatory political participation. The paper made the constitutional case for mandatory voting. As part of its solution section, the paper provided model legislation, which the students wrote themselves. Moreover, the authors delved into mandatory voting requirements in other countries to assess how those requirements worked and to understand lessons that can be learned from those jurisdictions. The paper was very well written; meticulously researched; and thoroughly compelling. It received on the highest grades in the class.

I have been privileged to get to know David outside of class. He came to office hours frequently and he organized a very successful event at which I participated. We have had numerous conversations about his future and his motivation for coming to law school. He wants to work for the federal government and has a deep and abiding commitment to public service. He wants to be a litigator and use his skill for improving the lives of others. I am confident that David will be extremely successful in whatever he does.

I should also add that David is one the nicest and kindest students I have taught. He's not just an academic superstar, he's also a superstar of a person. He's respectful but knows when to push back. He's cooperative and works extremely well with others. He is supportive of the ideas and ambitions of others though he himself is no wallflower. He has the perfect mix of ambition and humility. I have truly enjoyed getting to know him better.

The bottom line is that David will be a very successful law clerk and a very successful lawyer. He is as meticulous of a researcher as one could find. He approaches his work with care and pride. He is as smart as he is engaging. He writes extremely well and gets his work done on time. In short, he possesses all the qualities necessary for him to be both a successful law clerk but also a very successful professional. I am happy to recommend him, and I know you will be pleased to have him as a clerk in your chambers. I therefore encourage you to interview him. You will want to hire him and will not regret doing so. I recommend him without any reservations.

Sincerely yours

Guy-Uriel Charles
Charles Ogletree, Jr. Professor of Law

Guy-Uriel Charles - gcharles@law.harvard.edu

Laura M. Weinrib
HARVARD LAW SCHOOL
1545 Massachusetts Avenue
Areeda Hall 331
Cambridge, MA 02138

June 01, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is a great pleasure to recommend David Scharf for a clerkship in your chambers. A 2023 *cum laude* graduate of Harvard Law School, David is motivated, curious, and conscientious. His extensive research experience and strong analytic and writing skills will make him a successful clerk.

I first met David as a student in my First Amendment class in fall 2021. It was evident from David's responses to cold calls that he was very well prepared and grasped the nuances of the doctrine. His comments in class and on the Canvas discussion board were sophisticated and insightful, as were his answers on the anonymously graded exam. He earned an H for the course, a grade that is consistent with his strong performance across the law school curriculum. David has earned Honors grades in the majority of his classes, and rare Dean's Scholar Prizes in Criminal Law, Evidence and Corporations.

David was eager to grapple with the policy implications of First Amendment law, within and outside the classroom. Having majored in Labor Relations as an undergraduate at the Cornell University ILR School, he had special insight into the recent Supreme Court cases at the intersection of labor and First Amendment law. I was fortunate that David was on call when we discussed *Janus v. AFSCME* in class; he clearly and succinctly articulated the argument that agency fees are economic rather than political in nature, and he expertly defended the position (rejected in *Janus*) that overcoming the free rider problem is a compelling government interest. He also came to my office hours to discuss a memo he wrote while interning with the U.S. House Select Subcommittee on the Coronavirus Crisis, evaluating when congressional subpoenas violate the First Amendment. The memo provided an excellent distillation of the case law—a notable achievement given that David had not yet studied the First Amendment when he prepared it. David thoughtfully highlighted both the complexities of the doctrine and the difficult policy questions involved, and it was clear that he was eager to explore these issues further. Since then, he has examined the problem of disinformation in conjunction with his Election Law course, and he has worked on two defamation cases through the Democracy and the Rule of Law Clinic.

As a law student, David pursued opportunities to develop his legal research and reasoning skills. In his clinical work, he navigated a broad range of research-intensive assignments on such topics as defamation, anti-SLAPP laws, the impeachment of President Andrew Johnson, and the legislative history of the Ku Klux Klan Act of 1871. He was Executive Technical Editor of the *Harvard Civil Rights-Civil Liberties Law Review*—a position that will prepare him well for the rigors of clerking. And he was active in the law school community, serving as co-President of the American Constitution Society and Alumni Relations Chair of the Harvard Jewish Law Students' Association.

David is a self-directed learner with excellent organizational and legal reasoning skills. He is exhaustive in his research, and he will tackle assignments with initiative and enthusiasm. I am delighted to recommend him.

Sincerely,

Laura Weinrib
Fred N. Fishman Professor of Constitutional Law
Suzanne Young Murray Professor at the Radcliffe Institute for Advanced Study

Laura Weinrib - lweinrib@law.harvard.edu

DAVID R. SCHARF

1580 Massachusetts Avenue, Apt 5C, Cambridge, MA 02138
dscharf@jd23.law.harvard.edu | (914) 874-3643

WRITING SAMPLE

Drafted Spring 2022.

Used with permission from the Harvard Law School Democracy and the Rule of Law Clinic.
Identifying information has been redacted to protect confidentiality.

The attached is a 9-page memo regarding choice of law issues concerning the First Amendment.

MEMORANDUM

To: Jane Smith, Counsel, Protect Democracy
From: David Scharf, Student Attorney
Date: February 24, 2022
Re: Choice of Law and the First Amendment

Questions Presented

Defamation suits concern both the First Amendment, a federal issue, and state law, and there can be substantial overlap between the two. Thus, the line between state and federal issues is blurred, especially when determining the legal standards of “public figure,” “actual malice,” and “public concern.” This memo addresses how federal courts understand these issues and when they should apply state versus federal law.

1. Do federal courts look to state courts’ interpretations of U.S. Supreme Court pronouncements on the First Amendment, or their relevant circuit courts’ interpretations?
2. In the context of defamation, which issues are considered state issues and which are federal issues? Where do determinations of public figures, actual malice, and public concern fall in Georgia law?

Brief Answers

1. Since the Supreme Court’s landmark decision in *Erie*, federal courts have jurisdiction over all federal questions. Both the D.C. Circuit and the Eighth Circuit have said that state court opinions on the First Amendment are persuasive for federal courts, but not binding, as they usually present federal, rather than state, issues. Federal district courts should look to their relevant circuit court for binding analyses of federal issues.
2. To determine whether an issue is a state or federal one, federal courts will look to see whether state courts adhere to the U.S. Supreme Court’s holdings on defamation, or whether they apply limitations separate or beyond that which is required by the U.S.

Supreme Court. As Georgia courts follow the U.S. Supreme Court jurisprudence closely on determinations of actual malice and public figures, a federal court otherwise applying Georgia law should consider those to be federal issues, and look to their relevant circuit for instructions on how to analyze. While the “public concern” standard is generally analyzed as a federal issue, and federal law is therefore applied, when Georgia courts interpret the standard in relation to Georgia’s anti-SLAPP law, it is thought of as a state issue, and state law should apply.

Discussion

This memo discusses the situations in which federal courts, when applying state law, will not defer to a state court’s interpretation of First Amendment limitations on defamation laws when the underlying issue is one of federal concern, and instead apply the relevant circuit court’s law. It is judicial gospel that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.” *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Issues based on the U.S. Constitution are federal issues and courts “have the duty to make [their] independent inquiry and determination.” *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 192-93 (8th Cir. 1965) (holding that Minnesota courts’ decisions on the Fourteenth Amendment are persuasive, but not binding upon a federal court); *see Sullivan v. Murphy*, 478 F.2d 938, 972 (D.C. Cir. 1973) (holding that when the issue is of federal concern, “the *Erie* doctrine is wholly inapplicable; and all elements of the action are governed by Federal law.”). When a state court decides a federal question, federal courts need not defer to that interpretation, unlike for state issues. *Hawkman v. Parratt*, 661 F.2d 1161, 1166 (8th Cir. 1981); *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F.Supp.2d 174, 181 (D.D.C. 209). Because

the First Amendment is a federal issue, federal courts do not defer to state courts' interpretations of it. *See Payne v. WS Services, LLC*, 2016 WL 3926486, at *1 (W.D. Okla. 2016).

However, “[d]etermining whether a state court decision rested on federal or state law grounds is sometimes a difficult question.” *Perry v. Johnston*, 641 F.3d 953, 955 (8th Cir. 2011). This determination for defamation law is particularly challenging, considering “the common law of defamation, federal constitutional law, and the constitutional law of the various states reflect many of the same underlying principles,” and it is “often unclear to what extent a court decision relies on each.” *TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1182 (10th Cir. 2007). Because federal courts do not defer to state courts' understandings of federal issues, the First Amendment being one of them, “it is important that [federal courts] determine whether the state court imposed that limitation as a matter of state law or federal constitutional law.” *Id.* at 1181-82. To determine this, federal courts look to whether state law on a matter is based *solely* on an interpretation of the U.S. Constitution or Supreme Court jurisprudence, in which case the federal court should not defer to state law, or whether state courts give protections beyond that which is required by the U.S. Constitution, in which case federal courts should defer to state courts' interpretations. *Ace Cycle World, Inc. v. American Honda Motor Co., Inc.*, 788 F.2d 1225, 1228 (7th Cir. 1986).

When federal courts determine that state courts' standards are based on U.S. Supreme Court pronouncements, they apply the federal law from their respective circuit courts. *See, e.g. Stockley v. Joyce*, 2019 WL 630049, *10 (E.D. Mo.) (holding that because defamation pleading standards are issues of federal law, the court should apply interpretations of the Eighth Circuit, rather than Missouri courts); *Deripaska v. Associated Press*, 282 F.Supp.3d 133, 140-41 (D.D.C. 2017) (citing the D.C. Circuit's interpretation of Supreme Court pronouncements of the First

Amendment, while citing D.C. substantive law for defamation standards). Even when federal district courts apply another state's defamation law, they must look to their relevant circuit's opinion on the federal issue. *See McKee v. Cosby*, 236 F.Supp.3d 427, 438-39 (D. Mass. 2017) (holding that even though it was applying Michigan defamation law, it should look to the First Circuit to determine the federal issue of whether a statement would be understood as opinion or fact); *see also Nobles v. Boyd*, 2015 WL 2165962, at *9 (E.D. N.C. 2015) (applying the Fourth Circuit's interpretation of the U.S. Supreme Court's First Amendment cases while applying California substantive defamation law).

A. Federal Courts Consider Defamation Analyses to be Federal Issues So Long as State Courts Adhere to the U.S. Supreme Court's Jurisprudence and Don't Apply Further Limitations

While it can be difficult to determine the line between state and federal issues, the Tenth Circuit has explored this issue in the most detail and has relied on two main factors to answer this question with respect to defamation. *TMJ Implants*, 498 F.3d at 1182-83. First, the Tenth Circuit found that Colorado courts recognize limitations on defamation causes of action beyond that which the U.S. Constitution requires. *Id.* Colorado law requires a showing of actual malice for all matters of public concern, even though the Supreme Court only requires actual malice when the alleged victim is a public figure or official. *Id.* Second, the Tenth Circuit found that Colorado courts rely on the Restatement (Second) of Torts, and would adopt its provisions even if not required by the U.S. Supreme Court. *Id.* Here, unlike Colorado law, Georgia defamation law is largely derived from the U.S. Supreme Court's jurisprudence, generally does not impose limitations beyond the U.S. Supreme Court's requirements, and does not rely on any Restatement of Torts, or any other extrajudicial legal theorems to determine defamation standards. *See Mathis*

v. Cannon, 573 S.E. 2d 376, 381 (Ga. 2002); *American Civil Liberties Union, Inc. v. Zeh*, 864 S.E.2d 422, 427 (Ga. 2021) (discussed *supra* at 5-7). Thus, for many defamation issues, because Georgia courts merely interpret federal law, federal courts should not defer to Georgia courts' interpretations.

There is no clear line that separates state and federal issues in defamation analyses. Federal courts must analyze the underlying substantive state defamation law and look to whether the jurisprudence is based solely on law derived from the U.S. Supreme Court's pronouncements of the U.S. Constitution, or whether state law provides protections separate from or beyond the protections which the U.S. Supreme Court affords. The next section analyzes three major standards of defamation law to see whether Georgia courts view them as federal issues or state issues.

B. Analysis of the Georgia Standards on “Public Figures,” “Actual Malice,” and “Public Concern”

I. Georgia Courts View Determinations of the Public Figure Standard as Federal, not State, Issues

In *Mathis*, the Georgia Supreme Court discussed state defamation law and described how Georgia courts should determine whether an individual is a limited-purpose public figure. 573 S.E. 2d at 381. In doing so, the Court ran through the history of the U.S. Supreme Court's opinions on the First Amendment, including discussing the seminal case on public-figure analysis, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The test that the Georgia Supreme Court used was based on a Georgia court of appeals' adoption of “a three-part analysis used in *federal* cases to determine whether an individual is a limited-purpose public figure.” *Mathis*, 573

S.E.2d at 381 (citing *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 183 (Ga. Ct. App. 2001), which adopted a test from an Eleventh Circuit case) (emphasis added).

The Georgia Supreme Court has cited the *Mathis* test as recently as October 2021. *Zeh*, 864 S.E.2d at 427 (Ga. 2021). In *Zeh*, the court overturned the lower court's decision because it relied on Georgia law, rather than the federal constitutional standard. *Id.* at 436. The court then went on to discuss why the plaintiff should be considered a public figure under the U.S. Supreme Court's decisions in *New York Times v. Sullivan* and *Rosenblatt v. Baer*. *Id.* at 436-37. Again, the Georgia Supreme Court criticized the lower court's failure to analyze the issue under federal, rather than state law. *Id.* at 437. Thus, because Georgia courts see the public figure determination as a matter of federal law, federal courts should apply their relevant circuit's law in determining whether a plaintiff is a public or private figure.

II. Georgia Courts View Determinations of Actual Malice as Federal, not State, Issues

Georgia courts' analyses of actual malice are driven by U.S. Supreme Court pronouncements, and thus, a federal court should view this as a federal issue. In its discussion of the actual malice standard, the Georgia Supreme Court in *Zeh* consistently cited the U.S. Supreme Court's jurisprudence, rather than Georgia decisions. *Zeh*, 864 S.E.2d at 428, 430 (referring to actual malice as the "*New York Times* actual malice standard"). Once the Georgia Supreme Court determined that the plaintiff was a public official, it applied the "*New York Times* constitutional standard[.]" referring to the actual malice standard. *Id.* at 439. In fact, the court said that "[a]ctual or constitutional malice is different from common law malice..." *Id.* (citing *Cottrell v. Smith*, 788 S.E.2d 772, 782 (Ga. 2016)). The Georgia court in *Zeh* repeatedly relied on the U.S. Supreme Court's holdings to determine the actual malice record, *id.* at 430 ("[T]he

Supreme Court has instructed that in determining whether a public-figure plaintiff has proven actual malice by clear and convincing evidence...”), and when the court did cite Georgia state court decisions, those opinions similarly cited the U.S. Supreme Court’s jurisprudence is determining whether the actual malice standard was met. *Id.* at 439-40 (citing *Jones v. Albany Herald Pub. Co., Inc.*, 658 S.E.2d 876, 880 (Ga. Ct. App. 2008); *Williams v. Trust Co. of Georgia*, 230 S.E.2d 45, 47-48 (Ga. Ct. App. Div. No. 3 1976)). Therefore, a federal court is very likely to find that Georgia law on actual malice is based on a federal issue, and will look to its relevant federal circuit court, rather than Georgia courts, to determine the issue.

III. Georgia Courts Employ the Public Concern Standard Based on State and Federal Law for Different Matters

The “public concern” standard is used by Georgia courts for different purposes. Georgia courts utilize the Supreme Court’s jurisprudence on the “public concern” standard to the extent that Georgia courts require the constitutional actual malice standard for private figures when the defamatory statement is on a matter of public concern. *Zeh*, 864 S.E.2d at 428 n.5, 437 n.19 (citing the Supreme Court standards for public concern in *Gertz* and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985): “we must apply the existing First Amendment doctrine established by the United States Supreme Court”; also noting some justices have questioned this doctrine); see *Cox Enterprises, Inc. v. Thrasher*, 442 S.E.2d 740, 741 (Ga. 1994) (citing the Supreme Court’s decision in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986)). Therefore, when a federal court applies Georgia defamation law, it should generally interpret the public concern standard with respect to its relevant circuit.

Yet, Georgia courts simultaneously use the public concern standard for matters only based on state law as well. The Georgia anti-SLAPP law, OCGA § 9–11–11.1, allows defendants

in a defamation action to move to dismiss the claim if they show that their challenged actions were “taken in furtherance of [their] constitutional rights of petition or free speech in connection with an issue of public concern *as defined by the statute*.” *Neff v. McGee*, 816 S.E.2d 486, 490 (Ga. Ct. App. 2018) (emphasis added). Georgia courts have interpreted the anti-SLAPP law’s definition of public concern as separate from the Supreme Court’s jurisprudence. *Id.* The anti-SLAPP law protects statements made in connection with matters of public concern when they are made before the legislature, executive, or judicial branches, or made in a public forum or in furtherance of one’s constitutional rights in connection with an issue of public concern. OCGA § 9–11–11.1(c). Even though the statute specifies that statements are privileged if they are in furtherance of one’s federal constitutional rights, Georgia courts have interpreted this law, and determined which statements are privileged, under state, not federal law. *See, e.g., Rosser v. Clyatt*, 821 S.E.2d 140, 145 (Ga. Ct. App. 2018) (analyzing the anti-SLAPP law by referencing only Georgia state court precedents).

For a matter of public concern in the defamation context to be privileged in Georgia, the relevant statements must have been made with “good faith, an interest to be upheld, a statement properly limited in its scope, a proper occasion, and publication to proper persons.” *Neff*, at 491 (citing language that goes back to a 1905 Georgia Supreme Court decision, *Sheftall v. Central of Georgia Ry. Co.*, 51 S.E. 646, 646 (Ga. 1905)). Rather than referring to the Supreme Court’s jurisprudence on matters of public concern, Georgia courts cite state law when interpreting the Georgia anti-SLAPP statute. Thus, any federal court, when interpreting the Georgia anti-SLAPP law, should apply Georgia courts’ interpretations of “public concern,” rather than their respective circuit.

Conclusion

As federal courts apply federal law, rather than state law, when the underlying state substantive law adheres to U.S. Supreme Court pronouncements, district courts in both Missouri and the District of Columbia will likely apply federal law for analyses of public figure and actual malice, and may, depending on the underlying issue, apply federal law for determinations of public concern.

Applicant Details

First Name **Cosima**
 Last Name **Schelfhout**
 Citizenship Status **U. S. Citizen**
 Email Address cs4007@columbia.edu
 Address

Address
Street
39 W 105th St., Apt 1
City
New York
State/Territory
New York
Zip
10025
Country
United States

Contact Phone Number **6319039481**

Applicant Education

BA/BS From **Georgetown University**
 Date of BA/BS **May 2018**
 JD/LLB From **Columbia University School of Law**
<http://www.law.columbia.edu>
 Date of JD/LLB **May 15, 2023**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Columbia Human Rights Law Review**
 Moot Court Experience **No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships **Yes**
 Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Paradis, Michel
mp3373@columbia.edu
Damrosch, Lori
damrosch@law.columbia.edu
212-854-3740
Shechtman, Paul
paulshechtman1@gmail.com
6467468657

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Cosima Schelfhout
39 W 105th St. Apt. 1
New York, NY 10025
(631) 903-9481
cs4007@columbia.edu

June 7, 2023

The Honorable Judge Kiyo Matsumoto
United States District Court
Eastern District of New York
225 Cadman Plaza East, Room S905
Brooklyn, NY 11201

Dear Judge Matsumoto:

I recently graduated from Columbia Law School and I am writing to apply for a clerkship in your chambers for the position open in 2025.

I plan to pursue a career in litigation and eventually work in the public interest. I am certain clerking in your chambers would prove invaluable in pursuit of these goals. I am also certain I have the skills necessary to be a successful district court clerk. Working as a journalist before law school, I learned to write and research effectively and efficiently. Covering breaking news, I translated complicated stories into simple narratives on tight timelines. I honed these skills at Columbia, where I acted as a teaching assistant for President Lee Bollinger and Professor Lori Damrosch, and as a Notes Editor for the Columbia Human Rights Law Review.

I have attached my resume, transcript, and writing sample. I have also included letters of recommendation from Professor Paul Shechtman (646-746-8657, paulshechtman1@gmail.com), Professor Lori F. Damrosch (212-854-3740, damrosch@law.columbia.edu), and Professor Michel Paradis (212-854-5332, mparadis@law.columbia.edu). The Honorable Judge Richard J. Sullivan (212-857-2450, Richard_Sullivan@ca2.uscourts.gov), whose seminar I took last fall, has kindly agreed to act as an additional reference. The writing sample I have included in this application is the final paper I wrote for Judge Sullivan's course, American Jurisprudence: Judicial Interpretation and the Role of the Courts.

Thank you for your consideration. Please contact me if you need additional information.

Respectfully,



Cosima Schelfhout

COSIMA SCHELFHOUT

39 W. 105th St., Apt. 1, New York, NY 10025 • 631-903-9481 • cs4007@columbia.edu

EDUCATION

COLUMBIA LAW SCHOOL, New York, NY

J.D., received May 2023

Honors: James Kent Scholar 2021–22 and 2022–23 (for outstanding academic achievement)

Activities: *Columbia Human Rights Law Review*, Notes Editor
Teaching Assistant for International Law, Professor Damrosch (Fall 2022)
Teaching Assistant for Freedom of Speech and the Press, President Bollinger (Fall 2021)
Research Assistant, TrialWatch

GEORGETOWN UNIVERSITY, WALSH SCHOOL OF FOREIGN SERVICE, Washington, DC

B.S.F.S., *magna cum laude*, received May 2018

Activities: *The Hoya*, Features Writer
Georgetown Journal of International Affairs, Section Editor

EXPERIENCE

DISTRICT JUDGE HON. RONNIE ABRAMS, New York, NY

Extern

January 2023–May 2023

Conducted legal research on personal jurisdiction, discovery, and class action certification. Attended pre-trial conferences and trials.

KOSOVO SPECIALIST CHAMBERS, The Hague, Netherlands

Legal Intern, Defense Team for Kadri Veseli

January 2022–August 2022

Drafted pre-trial motions and prepared memoranda on superior responsibility, judicial notice, and joint criminal enterprise. Conducted evidence review and attended pre-trial hearings.

QUEEN'S COUNTY DISTRICT ATTORNEY'S OFFICE, New York, NY

Extern

September 2021–December 2021

Acted as the lead prosecutor on two misdemeanor domestic violence cases at Queens Family Justice Center. Negotiated plea deals, subpoenaed evidence, drafted complaints, and argued pre-trial motions.

U.S. ATTORNEY'S OFFICE, S.D.N.Y., New York, NY

Legal Intern, Criminal Division

June 2021–August 2021

Drafted briefs for the Second Circuit. Researched and wrote memoranda. Attended depositions and trials.

BBC NEWS, Washington, DC

Producer

September 2018–July 2019

Newsgathering Intern

January 2018–September 2018

Secured interviews and conducted research for the production of television specials for BBC World News on subjects including the 2018-19 public trial of El Chapo and first anniversary of the Parkland shooting. Monitored wires and briefed correspondents before live broadcasts.

BBC NEWS NORTH AMERICA EDITOR, JON SOPEL, Washington, DC

Research Assistant

December 2018–June 2019

Conducted original research for *A Year at the Circus: Inside Trump's White House* (Penguin Books).

LANGUAGE SKILLS: French (proficient)

INTERESTS: Long-distance running, 20th Century American Poetry, travel in Sub-Saharan Africa



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05/18/2023 11:43:31

Program: Juris Doctor

Cosima Schelfhout

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6410-1	Constitution and Foreign Affairs	Damrosch, Lori Fisler	3.0	A
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	B+
L6661-1	Ex. Federal Court Clerk - SDNY	Radvany, Paul	1.0	CR
L6661-2	Ex. Federal Court Clerk - SDNY - Fieldwork	Radvany, Paul	3.0	CR
L6655-1	Human Rights Law Review		0.0	CR
L8876-1	International Criminal Investigations	Davis, Frederick	3.0	A

Total Registered Points: 13.0**Total Earned Points: 13.0**

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6425-1	Federal Courts	Metzger, Gillian	4.0	A-
L6655-1	Human Rights Law Review		0.0	CR
L6274-3	Professional Responsibility	Rose, Kathy	2.0	A-
L8082-1	S. American Jurisprudence: Judicial Interpretation and The Role of Courts	Sullivan, Richard	2.0	A
L8169-1	S. Media Law	Balin, Robert; Klaris, Edward	2.0	A
L6822-1	Teaching Fellows	Damrosch, Lori Fisler	3.0	CR

Total Registered Points: 13.0**Total Earned Points: 13.0**

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A
L6655-1	Human Rights Law Review		0.0	CR
L6269-1	International Law	Damrosch, Lori Fisler	4.0	A
L6169-3	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	B+
L6695-1	Supervised JD Experiential Study	Paradis, Michel	3.0	A
L6683-1	Supervised Research Paper	Paradis, Michel	1.0	A

Total Registered Points: 15.0**Total Earned Points: 15.0**

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Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Shechtman, Paul	3.0	A
L6607-1	Ex. Domestic Violence Prosecution	Camillo, Jennifer; Kessler, Scott	2.0	A-
L6607-2	Ex. Domestic Violence Prosecution - Fieldwork	Camillo, Jennifer; Kessler, Scott	2.0	CR
L6655-1	Human Rights Law Review		0.0	CR
L8079-1	Jurisprudence of War [Minor Writing Credit - Earned]	Paradis, Michel	3.0	A
L6675-1	Major Writing Credit	Paradis, Michel	0.0	CR
L6683-1	Supervised Research Paper	Paradis, Michel	2.0	A

Total Registered Points: 12.0**Total Earned Points: 12.0****Spring 2021**

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6105-1	Contracts	Scott, Robert	4.0	A-
L6108-3	Criminal Law	Liebman, James S.	3.0	B+
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6229-1	Ideas of the First Amendment	Abrams, Floyd; Blasi, Vincent	4.0	A
L6130-2	Legal Methods II: Transnational Law and Legal Process	Cleveland, Sarah	1.0	CR
L6121-2	Legal Practice Workshop II	Olds, Victor	1.0	P
L6116-3	Property	Glass, Maeve	4.0	CR

Total Registered Points: 17.0**Total Earned Points: 17.0****Fall 2020**

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-1	Civil Procedure	Lynch, Gerard E.	4.0	CR
L6133-2	Constitutional Law	Pozen, David	4.0	B
L6113-1	Legal Methods	Ginsburg, Jane C.	1.0	CR
L6115-2	Legal Practice Workshop I	Olds, Victor; Yoon, Nam Jin	2.0	P
L6118-1	Torts	Blasi, Vincent	4.0	B

Total Registered Points: 15.0**Total Earned Points: 15.0****Total Registered JD Program Points: 85.0****Total Earned JD Program Points: 85.0****Honors and Prizes**

Academic Year	Honor / Prize	Award Class
2022-23	James Kent Scholar	3L
2021-22	James Kent Scholar	2L

Page 2 of 3

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	40.0

UNOFFICIAL

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to give my strongest possible recommendation for Cosima Schelfhout to be a clerk in your chambers. I have had the pleasure of knowing Cosima for the past two years at Columbia as a student in my seminar, the Jurisprudence of War, as well as the faculty supervisor of her note and her independent research project with the Kosovo Specialist Chambers. In all three capacities, I found Cosima creative, hard-working, and a genuine pleasure to work with. She is an avid researcher and clear writer. And I have been consistently impressed by her, exceptional, legal acumen, dedication, and work ethic.

I first taught Cosima in the fall of her second year at Columbia, where she was an exceptional student. As we explored the President's War Powers and the application of the Constitution abroad, Cosima could consistently be relied upon to participate meaningfully in class discussions, to ask pertinent and incisive questions, and to engage both respectfully and meaningfully with her fellow students on what were often very contentious topics. In our brief conversations before and after class, I was impressed by her earnest enthusiasm for the subject and the law more generally.

Cosima has demonstrated an outstanding ability to conduct thorough legal research and distill complex legal concepts into clear and concise written analyses. For her term paper, Cosima produced a superb and original study of the duties that the Geneva Conventions impose upon states in their interactions with non-state armed groups. It was one of the best and most memorable papers I have graded in the decade I have taught at Columbia, and the fifteen years I have taught in the legal academy overall. Unsurprisingly, Cosima received an A.

I also had the privilege of serving as Cosima's note supervisor during her second year. I was instantly impressed by the originality of her proposal to study the legal obligations that states incur to civilian populations as they withdraw from conflict situations. This was on the heels of the United States' withdrawal from Afghanistan, and so the subject was topical as it was neglected by other scholars. And over the course of the year, Cosima proved herself to be diligent, never satisfied, and yet a genuine joy to work with. She worked independently, was receptive to feedback, and was always as happy to accept good suggestions and as she was tactful in rejecting bad ones. The result was a brilliant synthesis of international treaties, customary law, history, and legal commentary.

I continued supervising Cosima when she was hired as an intern for a defense team representing a Kosovar politician accused of war crimes before an international tribunal in the Hague. Cosima acquired her role on the team independently of Columbia and worked diligently through the university bureaucracy to ensure she received credit for her work. Over the course of several months, Cosima routinely sent me the work she completed for the internship, including draft motions and research memos. Her supervisors, the British Barrister Ben Emmerson and American Attorney Andrew Strong, also provided me with glowing feedback. And it was obvious why.

Over the past two years, in these diverse settings, I have gotten an excellent impression of Cosima's many skills. In addition to her talents, she has demonstrated an exceptional ability to manage her time and many burdens diligently. It is a sign of her professionalism and maturity that I never once had to "follow up" with her in any context. Instead, she proactively sent me her work, arranged for meetings well in advance, and was always punctual and prepared.

Finally, I would be remiss if I did not say a few words about Cosima's interpersonal skills. She is a genuine pleasure to work with. To talk with her is to be struck by her refreshingly earnest curiosity, her professional maturity, and her genuine friendliness. Combined with her obvious intellectual gifts and work ethic, she is precisely the kind of person who thrives in collaborative environments. Given the right opportunities, she will be a leading light of the profession in the decades to come.

In short, having taught Cosima and supervised her for the past two years, I cannot recommend her highly enough. I say this not only for her benefit but because she will be an invaluable asset to you and the legal profession. I give her my highest recommendation.

I am happy to support his candidacy further or answer any questions by phone (1.212.252.2142) or email (mp3373@columbia.edu).

Sincerely,

Michel Paradis

Michel Paradis - mp3373@columbia.edu

June 13, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am pleased to provide a very enthusiastic recommendation for Cosima Schelfhout, of Columbia Law School's JD class of 2023, who is an applicant for a clerkship in your chambers. I have known Cosima in multiple contexts during her law school studies and can attest to her outstanding qualifications and suitability to serve as your law clerk. This letter updates my letter initially prepared in April 2023, which was submitted via OSCAR prior to receipt of Cosima's final paper for my Spring 2023 class and prior to the award of final honors to the class of 2023 at graduation. These latest developments confirm my enthusiasm for Cosima's application, and I address them toward the end of this updated letter.

Cosima took my course in International Law in the Spring 2022 semester, during her second year in law school. This was a medium-sized class of about 35 students, in which it was possible to get to know the students reasonably well and appreciate their strengths and weaknesses. Cosima impressed me early on for her willingness to contribute to class discussions, in which she demonstrated thorough preparation of difficult materials and insights into the theory and practice of international law; over the course of the semester, she ranked near the top in overall class participation. My favorable impressions were confirmed by her excellent performance on the written components of assessment for the course, consisting of a research exercise with mandatory and optional parts, and a blind-graded examination. Cosima turned in one of the very best research exercises, which, like the examination, was anonymously graded. The mandatory part of the research exercise instructed the students to locate bilateral and multilateral treaties with relevance to the Russian armed attack on Ukraine and to correlate treaty commitments with voting patterns in the United Nations General Assembly on a resolution deploring the attack and demanding withdrawal of Russian military forces. The optional part entailed research into treaties on suppression of crimes of international concern. The submission also included a reflective essay on the results of the treaty research. When the veil of anonymity was lifted, it was no surprise that Cosima's paper had achieved high marks on all components of the research exercise. Her blind-graded exam answers likewise placed her in the group qualifying for the highest grades. Based on all measures of evaluation, she was awarded the grade of "A," one of only a handful of "A" grades awarded in that class.

In light of her superior performance in my Spring 2022 class, I invited Cosima to serve as my teaching assistant for the Fall 2022 International Law class. In that role, she conducted weekly review sessions with the students, held periodic TA office hours, and assisted in the students' exam preparation. She carried out those responsibilities capably and I was very pleased with her work.

In the summer of 2022, when I lectured at The Hague Academy of International Law, I reconnected with Cosima who was then serving as an intern with the Kosovo Specialist Chambers based in The Hague, working with the defense team on a case involving war crimes in the former Yugoslavia. In that context, I learned of her interest in criminal law and encouraged her to develop that interest through future research and writing in her third year of law school.

In the 2022-2023 academic year, not only was Cosima my Fall 2022 teaching assistant, but I interacted with her through the Salzburg Cutler Global Fellows program, for which she was competitively selected to represent Columbia at a two-day seminar in Washington and to present her work-in-progress on a substantial research paper at a workshop in which I was a faculty commentator. For the seminar, she presented a paper with the title "Jus Post Bellum: Ensuring Protections for Civilians in Post-Conflict Environments," which she has developed as a full-scale note manuscript. The note argues for an interpretation of international humanitarian law in which states engaged in armed conflict incur an obligation to exercise due diligence to ensure protection of civilians in the post-conflict environment. Taking the U.S. withdrawal of armed forces from Afghanistan in August 2021 as illustrative of post-conflict problems in civilian protection, she analyzes the various strands of the laws of armed conflict to build the case for legal obligations not only in resorting to war (*jus ad bellum*) and during wartime (*jus in bello*), but also in preparing during war for the phase after wartime: *jus post bellum*. The note is deeply researched with an original and compelling humanitarian argument. It displays her skills at research and writing, which have been further honed through her work as a notes editor of the Columbia Human Rights Law Review.

In the Spring 2023 semester, Cosima took my course on the Constitution and Foreign Affairs and exercised the option to write a research paper in lieu of the examination. As her research topic, she chose the problem of foreign sovereign immunity as applied to criminal prosecution of foreign government-owned corporations – an issue that was pending at the Supreme Court in the *Halkbank* case for most of the semester and resulted in a Supreme Court ruling handed down in April 2023, shortly before the paper was due. That ruling resolved a question on which the Court had granted certiorari – whether the Foreign Sovereign Immunities Act provides immunity from criminal as well as civil jurisdiction – and left other questions open to be decided on remand. Cosima had to do the bulk of her research on this interesting topic before knowing which way the Court would rule; and then after the judgment came down, she had to finalize the paper in a matter of days, focusing mainly on the issues to be addressed on remand. Her analysis considers the open questions of whether customary international law on foreign state immunity binds U.S. states as a matter of federal common law, and also whether the Executive Branch could shield foreign states from criminal prosecutions in U.S. state courts through the vehicle of binding suggestions of immunity. She analyzes these issues against the backdrop of various modalities of constitutional argument, with attention to the Founders' views on creating "one nation" in foreign affairs and historical practice concerning Executive acts to make determinations of immunity binding on state as

Lori Damrosch - damrosch@law.columbia.edu - 212-854-3740

well as federal courts. I was very pleased with the paper, which confirms the views I had previously formed on the basis of her earlier work that she has research and writing abilities at the high level expected of a federal law clerk.

In this class, as in all the other contexts in which I have seen her in action, she was an active contributor in full command of complex material. Because of the high quality of the paper and her class participation, she again received the grade of "A," the highest grade awarded.

My high opinion of Cosima's accomplishments is evidently shared by my Columbia law faculty colleagues, as she has attained academic honors at the James Kent Scholar level, which is Columbia's top bracket of academic distinction and evidence of her qualifications for a top clerkship. Now that her transcript for her final semester is in hand, I am pleased to observe that she has been awarded the Kent Scholar distinction for both the 2021-2022 and 2022-2023 academic years. Only a small fraction of her classmates have earned this high honor twice.

In connection with preparing this recommendation, I had the opportunity to review a packet of materials which Cosima shared with me, which included a paper she had written the previous semester for the Seminar on American Jurisprudence: Judicial Interpretation and the Role of Courts. The title of the paper, "The Inconsistent Case for Originalism," caught my eye and I read it out of interest and for its connections to the themes of constitutional interpretation that are central to my course on the Constitution and Foreign Affairs (in which she was then working on the Halkbank paper; see above). The Originalism paper reviews selected writings on originalism by three of the most influential exponents of that method – Judge Robert Bork, Justice Antonin Scalia, and Justice Clarence Thomas – and shows that each of these authors resorts to non-originalist methods in their advocacy of originalism: that is, they invoke the very methods they criticize – for example, consequentialist arguments – in support of their contention that originalism is preferable to other modalities. It offers an intriguing perspective on one of the central problems of constitutional methodology of recent decades and shows her aptitude for legal writing.

In all the settings in which I have worked with her and learned of her work with others, Cosima has demonstrated the range of qualities that you would want to have in your law clerk. I also know of her passionate interests in human rights, criminal law and procedure, and constitutional law – all of which she will bring to bear in a clerkship. I urge you to invite her for an interview and select her to serve in your chambers.

Sincerely yours,

Lori Fisler Damrosch

PAUL SHECHTMAN
335 Greenwich Street, Apt. 2C
New York, NY 10013
917-796-5123

April 18, 2023

To Whom It May Concern:

I am writing to recommend Cosmina Schelfhout for a clerkship. Cosmina was my student at Columbia Law School in Evidence and Criminal Adjudication and received an A in both courses. Her exams were among the highest in each class and showed a complete command of the material, as did her class participation.

Cosmina approached me after class one night to talk about her experience as an intern at the U.S. Attorney's Office for the Southern District of New York in the summer after her first year in law school. (I did two stints in that Office, the second as Chief of the Criminal Division.) Her enthusiasm was evident. She also told me about working in the Hague and her interest in human rights law. As a result, I arranged for her to meet with a former Southern District AUSA who had worked in the Hague, and the two hit it off; the meeting proved enjoyable for them both. What is plain is that Cosmina takes initiative: she wants a career as a litigator, most likely in the public sector, and she has used her time in law school (and law school summers) to advance that goal.

Cosmina has all the other characteristics that make for a good law clerk: she is unpretentious and has a keen sense of humor. Although she did no writing for my classes, her extensive background in journalism suggests that she will not fail you on that score. High grades and a winning way are a receipt for a first-rate law clerk, and I have no doubt that Cosmina will be just that. I recommend her to you without reservation.

Sincerely,

Paul Shechtman

Cosima Schelfhout
 Fall 2022: American Jurisprudence
 Final Paper

THE INCONSISTENT CASE FOR ORIGINALISM

INTRODUCTION

Originalism is a method of constitutional interpretation that looks to the public meaning of the text when ratified.¹ While variations of the method have existed since the founding, originalism took its modern form in the 1980s.² Robert Bork elevated discussions of originalism to the national stage during his U.S. Supreme Court hearings in 1987,³ and by 1991 two Supreme Court justices adhered to the school of interpretation.⁴ Today, Bork, Scalia, and Thomas rank among originalism's central proponents—having advocated for its adoption in opinions and scholarly articles. The authors argue that judges must be bound by the Constitution's original meaning for a host of reasons, including dangers inherent in alternative schools of interpretation (“non-originalist exegesis”),⁵ the structure of the Constitution, and the tendency of judges to “mistake their own predilections for the law.”⁶ Among these reasons, however, one is hard-pressed to find an “originalist” argument for employing the school of interpretation—an argument that the “original meaning” of the Constitution requires judges to employ originalism.⁷

¹ JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 3 (2005) (describing originalism as “an attempt to discover the public meaning [of the Constitution] for those who made it law”). While some “originalists,” such as Raoul Berger, argue that the meaning of the Constitution is grounded in the “subjective intentions of the framers,” Scalia and Bork advocate for a “public meaning” version of originalism. Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 915-916 (1998). While Bork often refers to “original intent” as opposed to “original understanding” in his earlier works, he clarifies in *The Tempting of America*, that he refers to original “intent” as a “shorthand formulation” for “what the public at the time would have understood the words to mean.” Robert H. Bork, *THE TEMPTING OF AMERICA* 154 (1990).

² Boyce argues that Originalism was first coined by Paul Brest in *The Misconceived Quest for the Original Understanding* 60 B.U. L. REV. 204, 204 (1980). He notes that while similar schools, such as “interpretivism” and “intentionalism” may be traced to earlier decades, “[t]he emergence of modern originalism as a consistent theory of constitutional interpretation” developed relatively recently as a response to legal realism. Boyce, *supra* note 1, at. 909-910.

³ O'NEILL, *supra* note 1, at 3.

⁴ *Current Members*, THE SUPREME COURT OF THE UNITED STATES, WWW.SUPREMECOURT.GOV/ABOUT.

⁵ Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L.R. 850, 863 (1989).

⁶ *Id.* See discussion *infra* Section I.A.

⁷ See discussion *infra* Sections I. A.

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Among the sample of works reviewed, Scalia and Bork discuss the original meaning of the Constitution with regard to constitutional interpretation only once and Thomas, who has published less scholarly material on the matter, fails to do so at all.⁸

One might argue that the authors fail to make exclusively or even predominantly originalist arguments for originalism because the public meaning of the Constitution at the time of its ratification did not include an understanding that federal judges would employ originalism. Or perhaps, that it included the opposite: an understanding that federal judges would employ a particular non-originalist interpretative method. The history, however, is inconclusive. While Scalia and Bork point to evidence that some in the legal community embraced an early form of originalism around the time the Constitution was drafted,⁹ several works suggest that early originalism was neither dominant nor consistently applied during the founding.¹⁰

Whether or not the historical record supports the case for originalism, Bork, Scalia, and Thomas' failure to make an exclusively or mostly originalist argument for the method is significant. In eschewing text-based arguments, Scalia, Bork, and Thomas adopt other schools of interpretation of which the authors are especially critical. In doing so, the authors make several important concessions about originalism. First, the authors imply democratic consent for the

⁸ For this paper, I examined the following works of Scalia: Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L.R. 850, 863 (1989), ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012), Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, THE TANNER LECTURES OF HUMAN VALUES; *Original Intent and a Living Constitution: a Conversation between Scalia and Breyer*, SUPREME COURT HISTORICAL SOCIETY, supremecourthistory.org/info/supremecourthistory_society_events. I also examined the following works by Robert Bork: Robert H. Bork, *THE TEMPTING OF AMERICA* (1990); Robert H. Bork, *Original Intent: The Only Legitimate Basis for Constitutional Decision Making*, JUDGES J. (1987); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. (1986); Robert H. Bork, *The Uphill Fight: Can John Roberts Restore the Constitutional Order?* 57 NAT. R. (2005). Finally, I reviewed the following works by Thomas: Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1 (1996); Clarence Thomas, *How to Read the Constitution*, WRISTON LECTURE TO THE MANHATTAN INSTITUTE (2008).

⁹ See discussion *Infra* Section II.A.

¹⁰ *Id.*

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method—a primary justification for the necessity of originalism—may be lacking. Second, the authors suggest that relying on non-originalist methods of interpretation may be necessary when the historical record is unclear. Finally, the authors indicate that other methods of interpretation may be necessary to legitimize certain constitutional interpretations.

While several authors have challenged the historical bases of originalism,¹¹ and some have pointed to the failure of its proponents to make an originalist case for the method,¹² few works have categorized the types of arguments Bork, Scalia, and Thomas rely on instead. Moreover, few have assessed the implications of the authors' reliance on alternative methods of interpretation. As such, an analysis of the implications of originalists' use of alternative interpretive styles is necessary to gain a fuller understanding of originalism and the arguments made in its favor.

I. BASES OF ORIGINALISM

A. *Alternative Methods*

Originalism emphasizes near complete reliance on the text of the Constitution and history, cautioning against consideration of “abstract purposes” and consequences.¹³ In their writings on the subject, however, neither Scalia, Bork, nor Thomas, rely exclusively on the text of the Constitution or the history surrounding its adoption. Rather, the authors look to the Constitution's abstract aims and the practical consequences of employing originalism or failing to do so. Bork

¹¹ See Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw. U. L. REV. 226, 280 (1988); Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENTARY 159, 160 (1996).

¹² Stephen Breyer, *Tanner Lecture on Human Values* 2-3 (2004).

¹³ *Id.* at 1 (noting that originalism “cautions strongly against reliance on...abstract purposes and the assessment of consequences” and looks instead to “language...structure, history and tradition”); See also, Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639 (2016) (describing the originalism “toolkit” to include, in addition to the text, “founding-era dictionaries, The Federalist Papers, the Convention debates, and debates in the state ratifying conventions”).

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also presents arguments rooted in “common sense” that are largely absent in both Scalia’s and Thomas’ works.

Scalia, Bork, and Thomas reason that judges must adopt originalism because the structure of the Constitution commands it. Scalia argues that the judiciary’s most important function, judicial review, would be rendered futile if the Constitution’s meaning could change over time. For the judiciary to check the other branches, he contends, the Constitution’s meaning must be fixed.¹⁴ Scalia goes on to discuss the purpose of a constitution in a democratic government. He argues constitutional guarantees are designed to “prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable.”¹⁵ He adds that it is the legislature’s role, as opposed to the judiciary’s, to ensure that laws reflect modern values.¹⁶ Bork makes a similar argument. He contends the only way to keep judges from exercising legislative power to bind them by law “that is independent of their own views of the desirable.”¹⁷ He points to that the amendment provision of the Constitution as further evidence that judges may not shift the meaning the Constitution, stressing the provision precludes gradual changes to the text’s meaning over time.¹⁸ Bork also makes a federalism argument in favor of originalism, stressing that the Constitution’s language must be interpreted literally to preserve the delicate federal-state balance of powers envisioned by the drafters.¹⁹ Thomas echoes Scalia and Bork’s separation of powers concerns. Drawing attention to Article III, he stresses that originalism is necessary to give meaning to the Constitution’s assurances of life tenure and an irreducible salary. Such provisions, he argues, ensure the judiciary’s independence—

¹⁴ *The Lesser Evil*, *supra* note 8, 854.

¹⁵ *Id.* at 862.

¹⁶ *TEMPTING OF AMERICA* *supra* note 8, at 151-155.

¹⁷ *The Uphill Fight*, *supra* note 8, at 3-4.

¹⁸ *TEMPTING OF AMERICA* at 143.

¹⁹ *Id.* at 139-140.

Cosima Schelfhout

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independence that would be undermined if judges were freed from the confines of original meaning.²⁰ Thomas also notes the Constitution's failure to provide formal checks on the judiciary's power as evidence that the text of the Constitution must provide a meaningful limitation on judge's power of interpretation.²¹ Finally, and perhaps most significantly, Thomas reiterates Scalia's argument that the authority of the judiciary derives entirely from the "will of the people expressed by the Constitution." Thus, he suggests, judges exceed their authority when they go beyond the text's original meaning.

While the authors rely in part on separation of powers and federalism, Scalia and Bork ultimately frame their arguments as a choice between alternatives; both authors stress the defects of non-originalism and the relative strengths of originalism. Scalia argues non-organist methods lack consistency, as they fail to specify which "fundamental values" should replace original meaning, and ignore the extent to which the expansion of rights often entails the contraction of other rights.²² While originalism is challenging to apply²³ and often "too difficult to swallow,"²⁴ it provides a consistent guide for judges that mitigates the impact of incorrect decisions by tying judges to history and reduces the extent to which judges will "mistake their own predilections for the law."²⁵ In sum, Scalia argues originalism's weakness are "less likely to aggravate the most significance weakness of the system of judicial review."²⁶ Similarly, Bork stresses that originalism is the method best suited to combat the politicization of the courts²⁷ and to confer

²⁰ *How to Read the Constitution*, *supra* note 8, at 2.

²¹ *Id.*

²² *The Lesser Evil*, *supra* note 7, at 852-863.

²³ *Id.* at 856 (arguing that "plumb(ing) the original understanding" of an ancient text is "extremely difficult" because it requires considering an "enormous mass of material" and an evaluation into reliability)

²⁴ *Id.* at 861 (arguing that some original meanings are so out of touch with modern understanding that they must not be sustained by courts if originalism is to be considered a "practical theory of exegesis").

²⁵ *Id.* at 863.

²⁶ *Id.*

²⁷ *Original Intent*, *supra* note 7, at 14 (arguing that if the Constitution lacks a fixed meaning, "there would be no law other than the will of the judge").

Cosima Schelfhout

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legitimacy to the judicial process.²⁸ While Thomas makes relatively few consequentialist arguments, he stresses that originalism is more likely to produce impartial results, as other methods of interpretation “have no more basis on the Constitution than the latest football scores.”²⁹ Finally, Bork also makes an appeal to common sense, contending that lawmakers generally intend to bind judges to the text “as generally understood at the enactment.”³⁰ As such, he argues, judges should assume the same rule applies the Constitution and adopt “the common, everyday view of what the law is.”³¹

B. An Originalist Case

As evidenced, neither Scalia, Bork nor Thomas relies entirely on originalism to make their case. Scalia and Bork, however, incorporate originalist arguments, among others, in their larger works.³² For several reasons, however, these arguments are unpersuasive.

First, the inclusion of non-originalist arguments alone, alongside originalist accounts, contradicts originalism’s emphasis on text and history. Bork occasionally acknowledges his reliance on other interpretative methods, writing that judges would be required to adopt originalism “[e]ven if evidence of what the founders thought about the judicial role were unavailable.”³³ He explains that even if the founders “rejected” originalism, “we would need to invent it” because “no other method of constitutional adjudication can confine court to a defined sphere of authority” and thus prevent them from assuming legislative powers.³⁴

²⁸ TEMPTING OF AMERICA, *supra* note 7, at 2 (arguing that the rise of non-originalist methods of interpretation, such as living constitutionalism, “delegitimize the law in the eyes of the American people”)

²⁹ How to Read the Constitution, *supra* note 7, at 2.

³⁰ TEMPTING OF AMERICA, *supra* note 7, at 5.

³¹ *Id.*

³² Scalia makes an originalist argument in Chapter 7 of *Reading Law*. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012). Bork makes an originalist argument in Chapter 7 of *The Tempting of America*. Robert H. Bork, *THE TEMPTING OF AMERICA* (1990).

³³ TEMPTING OF AMERICA, *supra* note 7, at 154-155.

³⁴ *Id.*

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Second, neither Bork nor Scalia presents evidence to suggest originalism—or something close to it—dominated at the time of the founding. Scalia, for example, cites two Scottish statutes enacted in the 15th and 16th centuries that forbade jurists from looking into a statute’s “intent and effect,” selections of William Blackstone’s *Commentaries on the Laws of England*, and a James Madison quote from 1821, in which the Founding Father wrote the Constitution should be “fixed and known.”³⁵ Scalia argues the materials signal that originalism is an “age-old idea in [Anglo-Saxon] jurisprudence.”³⁶ While Scalia is correct to suggest the materials prove originalism was an *idea* circulating American jurisprudence at the time of the founding, they fall short of indicating originalism was the predominant form of judicial interpretation practiced during the Constitution’s ratification.³⁷ Unlike Scalia, Bork claims that constitutional interpretation based on original understanding “was once the dominant view of constitutional law.”³⁸ Before making his case, however, Bork concedes that the relevant historical record is spotty, noting that “the debates surrounding the Constitution focused much more upon theories of representation than upon the judiciary.”³⁹ He proceeds to cite evidence from the Constitutional Convention in Philadelphia in which lawmakers stressed the importance of separation of powers and rejected attempts to “give judges a policy making role.” In particular, he references the failed attempt to create a “council of revision,” consisting of executive officials and members of the judiciary, with veto power over Congress.⁴⁰ While Bork’s evidence supports the conclusion that

³⁵ READING LAW, *supra* note 7, at 83-85.

³⁶ *Id.*

³⁷ It is worth noting that in the same text Scalia cites as evidence of Blackstone’s commitment to originalism, the English jurist stresses the importance of considering a statute’s purpose and “spirit.” In describing the proper approach to statutory interpretation, Blackstone writes, “the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it.” WILLIAM BLACKSTONE, 1723-1780 COMMENTARIES ON THE LAWS OF ENGLAND 58 (1962).

³⁸ TEMPTING OF AMERICA, *supra* note 7, at 151-155.

³⁹ *Id.*

⁴⁰ *Id.* at 153.

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framers wanted to insulate judges from politics, it does not support the conclusion that original understanding included an assumption that judges adopt originalism. Further, by relying on the individual statements of lawmakers at the Constitutional Convention, as well as rejected legislative proposals, as opposed to the common meaning of Art. III's text, Bork engages in a purposivist analysis to uncover original understanding.⁴¹

II. CONTESTED HISTORY

One might conclude that Scalia, Bork, and Thomas' limited reliance on history implies the historical record does not support an originalist case for the method of interpretation. Or more significantly, one might conclude it implies the historical record supports an originalist case for another method of interpretation, such as living constitutionalism.⁴² The historical record, however, is not so clear. Raul Berger is often cited for scholarship uncovering founding era support for originalism;⁴³ Berger argues the founders inherited a legal tradition that constrained judges to a "fixed standard" that "assured the Framers their design would be effectuated."⁴⁴ Berger relies upon 18th century English case law, as well as the writings of James Madison and Alexander Hamilton to support his claims.⁴⁵ Similarly, historian Johnathan O'Neill argues that

⁴¹ Eskridge includes rejected legislative proposals and sponsor statements among the evidence typically considered in a purposivist analysis of legislation. He ranks rejected proposals, however, among the least reliable sources of evidence, below committee reports and sponsor statements. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). Bork's reliance on purposivist methods may reflect his reliance on "original intent" as opposed to "original meaning" in certain pieces of his writing.

⁴² Living constitutionalism is a method of constitutional interpretation that assumes the Constitution is a "living" document, capable of "chang[ing] and adapt[ing] to new circumstances, without being formally amended." DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1 (2010). Those who employ living constitutionalism typically consider the text's purpose and the consequences of a particular interpretation, in addition to history, precedent, and Constitution's text. Breyer, *supra* note 11, at 2.

⁴³ Boyce, *supra* note 1, at 956.

⁴⁴ RAUL BERGER, *GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE 14TH AMENDMENT* 402-410 (1977).

⁴⁵ Berger cites the following quote by James Madison: "If the sense in which the Constitution was accepted and ratified by the Nation...be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers." He also quotes Thomas Jefferson as saying, "our peculiar security is in the possession of a written constitution... let us not make it a blank paper by construction." *Id.* at 403-405.

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“while [18th century] Americans occasionally consulted extrinsic sources, the usual practice, following Blackstone and the English inheritance, sought the originally intended meaning by examination of the constitutional text.”⁴⁶

Several authors, however, have been unable to substantiate such claims. Jack Rakove, for example, reviews founding era statements by Madison and Jefferson that demonstrate a wavering commitment to originalism, arguing the founders employed alternative modes of interpretation when such methods suited their political aims.⁴⁷ Boyce goes as far as to argue that the framers often rejected early forms of originalism in favor of non-originalist methods, such as “conventionalism,” explaining that the “dominant approach” to constitutional interpretation in the 18th and early 19th century was “informed by traditional law and common-law and natural law principles.”⁴⁸ Similar disputes surround Jonathan Gienapp’s recent scholarship into the Constitution’s early history. Gienapp argues the Constitution did not acquire a “fixed meaning” until decades after its ratification, citing disagreements among the framers about the Constitution’s status as a written legal text subject to a specific type of interpretation.⁴⁹ William Baude argues that while Gienapp uncovers “important debates in which prominent people disagreed about the nature and status of the Constitution” his research does not disprove “the dominance of public meaning originalism” so much as it demonstrates disagreement about “established rules.”⁵⁰

⁴⁶ O’NEILL, *supra* note 1, at 15. O’Neill concedes that while “interpreters were not unanimous about the content or proper application of intent...the idea that interpretation...could balance competing policy goals or ‘update’ the living Constitution to his view of contemporary requirements was almost never heard before the late nineteenth century.”

⁴⁷ Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENTARY 159, 160 (1996).

⁴⁸ Boyce, *supra* note 2, at 960.

⁴⁹ JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 4-18* (2018).

⁵⁰ William Baude, *The Second Creation and Originalist Theory*, BALKANIZATION (Oct. 15, 2018) balkin.blogspot.com/2018/10/were-framers-originalists-and-does-it.

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While the historical record neither fully supports nor refutes an originalist argument for a theory of constitutional interpretation rooted in the text's public meaning, the authors' reliance on alternative modes of interpretation, in response, perhaps, to the inconclusive record, is significant.

III. SIGNIFICANCE

One might question whether it matters if originalism's proponents advance an originalist argument in favor of the method. As Bork notes, "[e]ven if evidence of what the founders thought about the judicial role were unavailable," originalism's many benefits—including its capacity to constrain judges from exceeding their constitutionally assigned role—outweigh the benefits of alternative interpretative approaches.⁵¹ Scalia, Bork, and Thomas' failure to make an originalist case, however, is significant for three reasons: the authors call into question democratic consent for the interpretive method, suggest that relying on alternative methods may be necessary when the historical record is unclear, and imply that other methods of interpretation may be necessary to confer legitimacy to certain constitutional interpretations.

A. A Consent-Based Theory

As noted earlier, originalism's proponents argue use of the method is necessary, in large part, because the judiciary's authority to perform judicial review derives from the people's consent to be governed. Thus, Scalia and Thomas argue, when judges adapt the Constitution's meaning to reflect current values, they exceed the authority conferred to them.⁵² In sum, "the

⁵¹ TEMPTING OF AMERICA, *supra* note 7, at 154-155 (arguing that if originalism "were not common in the law...we would have to invent the approach of original understanding...[because] no other method of constitutional adjudication can confine courts to a defined sphere of authority and thus prevent them from assuming powers whose exercise alters...the design of the American public").

⁵² See, e.g., *Original Intent and a Living Constitution*, *supra* note 7, at 2 (arguing that judges must look to original meaning "because it depends on consent, which is what the people agreed to on adoption"); *How to Read the Constitution*, *supra* note 8, at 3 (stressing that "the framers structured the Constitution to assure that our national government be by the consent of the people" and that they did so by limiting each branch's powers).

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people” did not agree to a constitution whose meaning would change over time. Originalism’s unsettled historical basis, however, leaves open the possibility that “the people” did not consent to be governed by a text with fixed meaning. Gienapp’s research, noted earlier, presents evidence to support this claim.⁵³ Such evidence, if generally accepted, would present a serious challenge to the argument that originalism must be adopted to ensure judges adhere to their constitutionally assigned role and perhaps explains why Scalia, Bork, and Thomas are reluctant to rely exclusively on such claims.

Scalia’s understanding of originalism, however, might accommodate such a situation. Scalia argues judges may be afforded interpretative leeway where the Constitution is “*intentionally* vague,” though one must prove the provision’s public meaning was ambiguous “on the basis of textual or historical evidence.”⁵⁴ As such, according to Scalia, evidence to suggest those who ratified the Constitution did not agree to a specific interpretative method would be insufficient to allow judges to deviate from the public meaning of the text, absent evidence the Constitution was “*intentionally* vague” on the subject.

Notwithstanding Scalia’s workaround, one might argue that even without clear evidence of consent, originalism’s many advantages—including its compatibility with constitutional structure and capacity to keep judges’ personal preferences at bay—remain intact. However, arguing that originalism is “preferable” as opposed to “required”—that originalism should be adopted because of its practical advantages, as opposed to its basis in the Constitution—concedes the value of alternative methods of interpretation, namely pragmatism or consequentialism. Moreover, reliance on pragmatism opens up the possibility that originalism’s proponents are a

⁵³ GIENAPP, *supra* note 49, at 121-122 (stressing that “uncertainty over the content and applicability of common law rules of construction reaveled...that it was simply unclear at the time of ratification which rule of interpretation would guide federal judges”).

⁵⁴ *The Lesser Evil*, *supra* note 8, at 861-862.

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victim of their own critique: employing non-originalist modes that allow room for judges to

“write their own preferences into the Constitution.”⁵⁵ For example, one might argue that by

adopting abstract pragmatic and structural arguments in favor of originalism, Scalia, Bork, and

Thomas allowed room for personal preference in their analyses. Several scholars have raised the

similar critique that choosing to employ originalism in the first place often involves a normative

judgment.⁵⁶

C. Historical Gaps & Legitimacy

Scalia, Bork, and Thomas’ failure to rely on exclusively originalist arguments is also significant because it concedes a popular criticism of the model of interpretation: that it fails to

provide adequate guidance in the instance the history surrounding the public meaning of a

provision is unclear.⁵⁷ By considering abstract principles such as separation of powers and

federalism and the practical implications of adopting different interpretative modes, the authors

suggest judges may need to rely on more than text and history when neither provide clear

guidance on the meaning of a constitutional phrase or provision. Curtis A. Bradley and Neil S.

Seigal, argue, for example, that as originalism has become more popular, originalist judges have

become “more receptive to accommodating various non-originalist materials,” including post-

⁵⁵ *Judging*, *supra* note 8, at 6

⁵⁶ See, e.g., David A. J. Richards, *Originalism without Foundations*, 65 N.Y.U. L. REV. 1373 (1990) (arguing that Bork’s endorsement of originalism over “alternative positive models of constitutional interpretation” reflect his “personal interpretative views.”), Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 498 (1981) (“Arguing that in employing originalism, judges necessarily make “decisions of political morality” when they adopt “one conception of constitutional intention rather than another”).

⁵⁷ See, e.g., *Tanner Lecture on Human Values*, *supra* note 8, at 3 (stressing that historical uncertainties “often fail to provide objective guidance”), Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189-90 (1987) (arguing that the relevant history is often unclear enough to account for multiple possible interpretations, allowing judges to make decisions on policy grounds).

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founding historical practice to accommodate for situations in which “original learning in unknown or unknowable.”⁵⁸

By relying on non-originalist arguments to make their case, Scalia, Bork, and Thomas also concede that such arguments may be necessary to garner public support for constitutional interpretations, especially when the history surrounding a provision is unclear. To make their case, to the legal community and public at large, Scalia, Thomas, and Bork argue originalism is not just required by the Constitution, but likely to result in better decisions,⁵⁹ reduce the politicization of the courts, limit the risk that traditional rights will be contracted,⁶⁰ and prevent judges from legislating from the bench.⁶¹ While one might argue that public approval should not influence constitutional interpretation, both Scalia and Bork make appeals to legitimacy in their calls to adopt originalism. The authors contend that originalism is especially attractive because of its capacity to confer legitimacy to constitutional interpretations by grounding judges’ interpretations in the text.⁶² Thus, in relying on alternative methods in their personal scholarly work, the authors suggest original meaning alone may be insufficient to convince the public of the need to adopt originalism on the bench.

III. COUNTERARGUMENTS

One could also argue that the conclusion that Scalia, Bork, and Thomas fail to make an originalist argument is overstated. As described above, Scalia, Bork, and Thomas rely in part on structural arguments, stressing that originalism is the method of interpretation most compatible with the structure of government envisioned by the Constitution. Some originalists argue that

⁵⁸ Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1 (2020).

⁵⁹ *The Lesser Evil*, *supra* note 8, at 863-864.

⁶⁰ THE TEMPTING OF AMERICA, note 8, at 4-10.

⁶¹ *The Lesser Evil*, *supra* note 8, at 865-66.

⁶² *The Uphill Fight*, *supra* note 8, at 3-4; *How to Read the Constitution*, *supra* note 8, at 2.

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constitutional structure, alongside text and history, plays an important role in originalist analyses.

Bork, for example, stresses that the “framer’s intent” should be understood to include a combination of text, structure, and history of the Constitution.”⁶³ Further, Professor Keith Whittington argues originalists often employ “arguments grounded in structures or values implicit in....the constitutional scheme” to clarify constitutional rules.⁶⁴ As such, one could argue that Scalia, Bork, and Thomas are not making concessions about the value of alternative interpretive methods, but rather employing arguments rooted in the Constitutional design to supplement an unclear original meaning.

This argument, however, fails to address two features of the authors’ writings on the subject. First, the critique does not account for the authors’ reliance on consequentialist arguments to advance originalism’s cause. Even if Scalia, Thomas, and Bork, made structural arguments to advance a textual reading, the authors devote near equal attention to the practical advantages of originalism and the dangers of its alternatives.⁶⁵ Second, the authors do not rely on structural arguments to *support* an originalist interpretation. Often considered a form of textualism,⁶⁶ originalism consults the text “as the first piece of evidence” in an analysis.⁶⁷ Scalia, Bork, and Thomas, however, do not “begin with the text” and use constitutional structure to fortify their reading. Rather, the authors often give structural principles self-sufficient weight.⁶⁸ Scalia, for example, argues that originalism alone can justify judicial review, by ensuring judges

⁶³ Robert H. Bork, *Original Intent: The Only Legitimate Basis for Constitutional Decision Making*, JUDGES J., 15 (1987).

⁶⁴ Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 390 (2013).

⁶⁵ See discussion *supra* Section I.A.

⁶⁶ *Id.* at 389 (noting that both Scalia and Lawrence B. Solum “characterize originalism as a form of textualism”).

⁶⁷ *Id.* at 389.

⁶⁸ Thomas, more so than Scalia and Bork, refers to specific constitutional provisions. For example, in arguing that judges must be impartial and separated from the political process, he refers to Article III, Section 1’s good behavior and irreducible salary provisions. Even here, however, Thomas does not quote or discuss the specific constitutional text. *How to Read the Constitution*, *supra* note 8, at 4.

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adhere to the structure of government envisioned by the Constitution, without reference to a

Constitutional provision.⁶⁹ Similarly, Bork argues the Constitution creates a system of democratic accountability that would be rendered meaningless if unelected judges are allowed to legislate from the bench, without tying his analysis to a particular article or provision.⁷⁰

Whittington stresses that constitutional design should only be relied upon to advance an original reading of the text, as it lacks “independent force” in an originalist analysis.⁷¹

IV. CONCLUSION

Scalia, Bork, and Thomas are undoubtedly responsible for originalism’s growth in recent years.⁷² By portraying originalism as not just the most legitimate mode of constitutional interpretation, but also the method most likely to constrain judges and reduce impartiality, the authors have convinced members of the public and judiciary alike of its advantages. In advancing originalism’s cause, however, the authors employ methods of interpretation they often criticize. In doing so, they not only leave room for policy preferences to shape their analyses but concede several of originalism’s central weaknesses. By relying on broad abstract constitutional principles and consequentialist arguments, Scalia, Bork, and Thomas intimate that originalism may provide insufficient guidance when the history surrounding constitutional text is unclear and imply that alternative methods of interpretation may be necessary to confer legitimacy on particular interpretations. Further, the authors’ failure to rely on an originalist argument alone raises questions about the historical record regarding originalism’s popularity during the founding. This, in turn, casts doubt on originalism’s central advantage: its status as the only method of interpretation consented to by those who ratified the Constitution.

⁶⁹ *The Lesser Evil*, *supra* note 8, at 854-855.

⁷⁰ *THE TEMPTING OF AMERICA*, *supra* note 8, at 4-5.

⁷¹ Whittington, *supra* note 60, at 390.

⁷² Eric E. Posner, *Why Originalism is So Popular*, *THE NEW REPUBLIC* (2011).

Applicant Details

First Name **David**
 Middle Initial **E**
 Last Name **Schulman**
 Citizenship Status **U. S. Citizen**
 Email Address david.schulman@law.nyu.edu

Address

Address
Street
60 Sutton Place South
City
New York
State/Territory
New York
Zip
10022

Contact Phone Number **917-647-0980**

Applicant Education

BA/BS From **New York University**
 Date of BA/BS **May 2020**
 JD/LLB From **New York University School of Law**
<https://www.law.nyu.edu>
 Date of JD/LLB **May 17, 2023**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **Moot Court Board**
 Moot Court Experience **Yes**
 Moot Court Name(s) **Cardozo BMI Entertainment and Media Law Moot Court Competition (Spring 2022)**
Orison S. Marden Moot Court Competition (Fall 2021)

Bar Admission

Prior Judicial Experience

Judicial
Internships/ **No**
Externships
Post-graduate
Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Sexton, John
john.sexton@nyu.edu
212-992-8040
Miller, Arthur
arthur.r.miller@nyu.edu
212-992-8147
Kahan, Marcel
marcel.kahan@nyu.edu
212 998-6268

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a recent graduate of the New York University School of Law writing to apply for a clerkship in your chambers for the 2025-2026 term. I will be starting this fall as an associate at Sullivan & Cromwell in the litigation group, which will provide me additional practical experience and valuable skills over the next two years in order to be an effective clerk. Indicative of my commitment to working hard along with a desire to always learn and improve is how I took on two jobs during my 1L and 2L summers as well as enrolled in max credits with multiple research positions for all of 3L.

I refined my research and writing skills as a research assistant to numerous professors, such as Arthur Miller, John Sexton, and Robert Bauer, as well as for the Institute of Judicial Administration. At NYU, I have served on multiple executive boards and most recently was part of the Student Bar Association on the Student-Faculty Clerkship Committee. Outside of leadership in organizations, I was a member of the Competitions Advocacy and Proceedings divisions of Moot Court Board, where I competed in the BMI Entertainment Moot Court Competition and published a student comment. I also graduated as both a Jacobson Law & Business Scholar and a Student Fellow for the Program on Corporate Compliance & Enforcement. In recognition of my law school achievements and community involvement, I received the Dean John Sexton Prize at Convocation. Overall, I believe my experiences have prepared me to contribute meaningfully to assist your work.

Attached are my resume, law school transcript, and writing sample. My recommendations are from President Emeritus John Sexton and Professors Arthur Miller and Marcel Kahan. The following people have agreed to serve as separate references for my leadership and working abilities:

Dean Emeritus Trevor Morrison
New York University School of Law
(212) 998-6011
trevor.morrison@nyu.edu

Vice Dean Randy Hertz
New York University School of Law
(212) 998-6434
randy.hertz@nyu.edu

Executive Director Allison Schifini
Institute of Judicial Administration
(212) 992-6289
schifinia@mercury.law.nyu.edu

Please let me know if I can provide any additional information. Also, please note that my 1L spring was interrupted by Covid approximately two weeks before exams since no formal mention is on my transcript.

Thank you very much for your time in considering my candidacy.

Respectfully,
/s/

David Evan Schulman

DAVID E. SCHULMAN

◆ (917) 647-0980 ◆ david.schulman@law.nyu.edu ◆

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

J.D., May 2023

Honors: Moot Court Board (journal equivalent), Competitions Advocacy & *Proceedings* Staff Editor
Jacobson Law & Business Scholar; Corporate Compliance & Enforcement Student Fellow
Dean John Sexton Prize (2023 Convocation Recipient)

Activities: T.A. – President John Sexton’s Religion and Government Seminar (Fall 2022 - Cancelled)
T.A. – Professor Arthur R. Miller’s Civil Procedure (Fall 2021)
Recent College Graduate Mentors, Co-Chair; Law & Business Association, Events Chair
IP & Entertainment Law Society, Networking & Development Co-Chair
Social Enterprise & Startup Law, Finance Chair
Student Bar Association, Clerkship Committee Student Rep. (previously First Year Rep.)

NEW YORK UNIVERSITY COLLEGE OF ARTS AND SCIENCE, New York, NY

B.A. with High Honors in English and American Literature, *magna cum laude*, May 2020

Minors: Social & Public Policy and Child & Adolescent Mental Health Studies

Senior Thesis: *Law and Literature: Legal Fiction Set in the Civil Rights Era*

Honors: *Phi Beta Kappa*; *summa cum laude* Departmental Honors; Presidential Honors Scholar
Evan Chesler Prelaw Scholar; University Honors Scholar/Founder’s Day Award

Activities: Order of Omega, Vice-President; College Cohort Leader (selected by NYU to mentor freshman)

EXPERIENCE

ROBERT BAUER, New York, NY

July 2022 – Present

Research Assistant. Assisting with writing project on political reform and the role of ethical choices in politics.
Helping Profs. Patrick Stewart and Bauer in connection with ALI working group on election official code of conduct.

U.S. ATTORNEY’S OFFICE, SOUTHERN DISTRICT OF NEW YORK, New York, NY

January 2023 – April 2023

Law Student Extern – Public Corruption Unit. Drafted a search warrant. Assisted with research and trial strategy.
Attended various proffer and cooperation meetings as well as trial motions. Reviewed evidence for investigations.

JOHN SEXTON & ZALMAN ROTHSCHILD, New York, NY

September 2022 – May 2023

Research Assistant. Assisting with law review articles on the First Amendment’s Religion Clause.

PROGRAM ON CORPORATE COMPLIANCE AND ENFORCEMENT, New York, NY

August 2022 – May 2023

Associate Editor of *Compliance & Enforcement*. Soliciting, editing, and posting pieces on various corporate topics.

SULLIVAN & CROMWELL LLP, New York, NY

May 2022 – July 2022

Summer Associate. Worked on matters concerning Financial Institutions, Antitrust, Securities, Class Actions, etc.

ARTHUR R. MILLER, New York, NY

June 2021 – January 2022

Research Assistant. Updated treatise on F.R.C.P. 46 – 50. Assisted with his hornbook on topic of Issue Preclusion.

INSTITUTE OF JUDICIAL ADMINISTRATION, New York, NY

June 2021 – August 2021

Summer Fellow/Research Assistant for Oral History Project. Drafted contracts. Researched and edited interviews.

TD SECURITIES (USA), New York, NY

June 2019 – August 2019

Compliance Summer Analyst. Created regulatory matrix on all business lines for Chief Compliance Officer.
Assisted with low-priced security reports for Anti-Money Laundering. Created compliance manuals/documents.

ADDITIONAL INFORMATION

Published five law-related articles as an undergraduate (list available upon request). Volunteer with SciTech Kids, NYDM, and NYC Parks. Switch-hitting baseball player, avid skier, and left-handed golfer. Enjoy racquetball, tennis, and reading science fiction and fantasy novels. Member of the ABA, Phi Alpha Delta, and Phi Delta Phi.

Name: David Evan Schulman
 Print Date: 06/05/2023
 Student ID: N12150361
 Institution ID: 002785
 Page: 1 of 2

**New York University
 Beginning of School of Law Record**

Degrees Awarded

Bachelor of Arts 05/20/2020
 College of Arts and Science
 Honors: magna cum laude
 Major: English and American Literature with high honors
 Minor: Child and Adolescent Mental Health Studies
 Minor: Social and Public Policy

Fall 2020

School of Law
 Juris Doctor
 Major: Law

Lawyering (Year) LAW-LW 10687 2.5 CR
 Instructor: Christopher B Jaeger

Criminal Law LAW-LW 11147 4.0 B
 Instructor: Erin Murphy

Torts LAW-LW 11275 4.0 A-
 Instructor: Barry E Adler

Procedure LAW-LW 11650 5.0 A
 CR/F grade option allowed due to extenuating circumstances: original professor's health issue required a series of alternating class sessions by professor and two other professors.
 Instructor: Arthur R Miller

1L Reading Group LAW-LW 12339 0.0 CR
 Topic: The Supreme Court
 Instructor: Trevor W Morrison
 Alison J Nathan

Current AHRS 15.5 EHRS 15.5
 Cumulative 15.5 15.5

Spring 2021

School of Law
 Juris Doctor
 Major: Law

Property LAW-LW 10427 4.0 B
 Instructor: Katrina M Wyman

Lawyering (Year) LAW-LW 10687 2.5 CR
 Instructor: Christopher B Jaeger

Legislation and the Regulatory State LAW-LW 10925 4.0 B
 Instructor: Samuel J Rascoff

Contracts LAW-LW 11672 4.0 B+
 Instructor: Liam B Murphy

1L Reading Group LAW-LW 12339 0.0 CR
 Instructor: Trevor W Morrison
 Alison J Nathan

Financial Concepts for Lawyers LAW-LW 12722 0.0 CR
 AHRS 14.5 EHRS 14.5
 Current 30.0 30.0
 Cumulative 30.0 30.0

Fall 2021

School of Law
 Juris Doctor
 Major: Law

Corporations LAW-LW 10644 5.0 A-
 Instructor: Marcel Kahan

Quantitative Methods Seminar LAW-LW 10794 2.0 A-
 Instructor: Daniel L Rubinfeld
 Katherine B Forrest

Regulation of Banks and Financial Institutions LAW-LW 11550 4.0 B+
 Instructor: Michael Ohlrogge

Orison S. Marden Moot Court Competition LAW-LW 11554 1.0 CR
 Teaching Assistant LAW-LW 11608 2.0 CR
 Instructor: Arthur R Miller

Current AHRS 14.0 EHRS 14.0
 Cumulative 44.0 44.0

Spring 2022

School of Law
 Juris Doctor
 Major: Law

Complex Litigation LAW-LW 10058 4.0 B+
 Instructor: Samuel Issacharoff
 Arthur R Miller

Issues in SEC Enforcement Seminar LAW-LW 10386 2.0 A-
 Instructor: Walter Ricciardi

Advanced Trial Simulation LAW-LW 11138 2.0 A-
 Instructor: David R Marriott
 Evan R Chesler

Antitrust & Regulatory Alternatives I LAW-LW 11348 3.0 B
 Instructor: Harry First

Criminal Securities and Commodities Fraud Seminar LAW-LW 12117 2.0 B+
 Instructor: Raymond Joseph Lohier, Jr.
 Steven Peikin

Current AHRS 13.0 EHRS 13.0
 Cumulative 57.0 57.0

Fall 2022

School of Law
 Juris Doctor
 Major: Law

Law and Business Projects Seminar LAW-LW 10236 1.0 A-
 Instructor: Gerald Rosenfeld
 Helen S Scott
 Robert Jackson

Business Crime LAW-LW 11144 4.0 A-
 Instructor: Jennifer Hall Arlen

Professional Responsibility and the Regulation of Lawyers LAW-LW 11479 2.0 A-
 Instructor: John P. Cronan

Constitutional Law LAW-LW 11702 4.0 A-
 Instructor: Kenji Yoshino

Religion and the First Amendment LAW-LW 12135 2.0 A-
 Instructor: Schneur Z Rothschild
 John Sexton

Research Assistant LAW-LW 12589 1.0 CR
 Instructor: John Sexton

Iconic Delaware Cases Seminar LAW-LW 12785 2.0 A-
 Instructor: Edward Baron Rock
 Matthew J Mallow
 Travis Laster

Current AHRS 16.0 EHRS 16.0
 Cumulative 73.0 73.0

Spring 2023

School of Law
 Juris Doctor
 Major: Law

Law and Business Projects Seminar LAW-LW 10236 1.0 A-
 Instructor: Gerald Rosenfeld
 Robert Jackson

Law and Business Projects Seminar: Writing LAW-LW 10346 1.0 A-

Name: David Evan Schulman
 Print Date: 06/05/2023
 Student ID: N12150361
 Institution ID: 002785
 Page: 2 of 2

Credit				
Instructor:	Gerald Rosenfeld			
Moot Court Board		LAW-LW 11553	0.0	CR
Federal Courts and the Federal System		LAW-LW 11722	4.0	A-
Instructor:	Helen Hershkoff			
Law, Economics and Journalism Seminar		LAW-LW 11989	2.0	B+
Instructor:	Barry E Adler			
	Paul M Barrett			
Research Assistant		LAW-LW 12589	1.0	CR
Instructor:	John Sexton			
Government Anti-Corruption Externship		LAW-LW 12769	3.0	A
Instructor:	Rachel Salem Pauley			
	Jennifer Rodgers			
Government Anti-Corruption Externship Seminar		LAW-LW 12770	2.0	A
Instructor:	Rachel Salem Pauley			
	Jennifer Rodgers			
Third Party Investment in Litigation: Law, Policy and Practice Seminar		LAW-LW 12782	2.0	A
Instructor:	Anthony Sebok			

	<u>AHRS</u>	<u>EHRS</u>
Current	16.0	16.0
Cumulative	89.0	89.0

Staff Editor - Moot Court 2021-2022
 Competitions Advocacy Editor - Moot Court 2022-2023

End of School of Law Record

Unofficial

**TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS**

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	All other JD and LLM (Non-Mandatory)
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	Maximum for A tier = 31%
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	Maximum grades above B = 57%
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

<i>Pomeroy Scholar:</i>	Top ten students in the class after two semesters
<i>Butler Scholar:</i>	Top ten students in the class after four semesters
<i>Florence Allen Scholar:</i>	Top 10% of the class after four semesters
<i>Robert McKay Scholar:</i>	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

June 07, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write in support of the candidacy of David Schulman for a clerkship in your chambers.

I first met David at an NYU Law School Admitted Students event in 2020. After the event, David followed up immediately, initiating a correspondence that continued during the summer. We discussed not only legal education but also baseball (in Summer 2020 I was drafting a book on baseball and the law and David shared with me his personal statement for his law school applications, which also was on baseball and the law), and the increasing Covid mandates.

During our initial meeting and the subsequent email exchanges, David expressed a hope that he would be assigned to my Civil Procedure section; however, he was assigned to one of my faculty colleagues who, coincidentally, was my Civil Procedure professor at Harvard Law School. In Fall Term 2020, in order to comply with Covid health and safety guidelines while still providing some in-person interaction between students and professors, NYU Law School employed a hybrid teaching method, whereby one-third of the students in each 1L section attended in person while the remaining two-thirds participated remotely. The groups rotated each third class meeting so that all students had an equal number of in-person and remote experiences. While David originally was in a different Civil Procedure section (and on a different rotation), my faculty colleague who was teaching David's section sustained a serious injury and was unable to continue teaching, so David's section was folded into mine mid-way through the Fall Term. Therefore, it was in this difficult hybrid learning environment, compounded by a change of professor mid-way through the term, that I came to know David as an active and engaged learner.

Despite this challenging situation, David excelled; indeed, based on his outstanding performance in Civil Procedure, he was selected as a Teaching Assistant for Civil Procedure in Fall 2021 (where, coincidentally, he was the Teaching Assistant to my son, who entered law school that Fall). David said he enjoys mentoring and teaching others, and he takes seriously the responsibility to enhance the experiences of others. David also was selected as a Research Assistant for both Professor Arthur Miller and for the Institute of Judicial Administration. David framed these experiences in terms of "learning beyond the classroom," and he seized the opportunity to develop even closer relationships with his TA and RA colleagues.

In addition to the classes I teach at the Law School, I also teach an advanced undergraduate seminar on the Relationship of Government and Religion. Focusing on sixteen words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...", the seminar uses as its course material in excess of 1,000 pages of unedited United States Supreme Court opinions. In the first half of the term we investigate the Establishment Clause, while in the second half we examine the Free Exercise clause. David embraced both the philosophy and demands of the seminar. In Fall Term 2020 the seminar was conducted remotely and, in spite of a rigorous 1L course load, David asked if he could observe the seminar. He developed a friendship with the Teaching Assistant for the seminar, and he consistently expressed how much he enjoyed observing the small group experience and how the robust discussion in the seminar broadened not only his understanding of Constitutional Law but also his perspective on teaching methods.

As much as David has a profound commitment to his academic life, he is equally engaged in the life of the law school community. He was elected as his section's 1L Representative to the Student Bar Association, where he immediately joined the Student Life & Spirit and Communications committee. As a 2L, he was elected Proceedings Staff editor for the Moot Court. He also is a member of the Campus Climate and Bias Committee, which works with Student Affairs on integral issues of equity and diversity within the law school. David also was the SBA representative on a working committee on possible grade reform. In each of these capacities and many others, he has emerged as a natural leader.

Throughout all these experiences and accomplishments, David and I have remained in regular contact: indeed, David served as my Teaching Assistant last Fall for the undergraduate seminar he first observed in Fall Term 2020.

Finally, I feel compelled to address David's performance in Spring Term 2021. Unfortunately, David had a severe Covid infection just prior to his final exams. Due to the unusual nature of the 2020-2021 academic year and its Covid mandates, he had the option to take his classes pass/fail but he chose the graded option. Despite his best efforts, he was unable to write his exams at a level which reflects his preparation and potential.

I have known David since he was admitted to NYU Law as his mentor, professor, and as my teaching colleague (when he served as my Teaching Assistant). In all of these aspects and from different perspectives, he consistently and thoughtfully considers law and displays a genuine joy in learning. He also cares deeply about and has a demonstrated commitment to the members of his communities. For all these reasons, it is my pleasure to write in support of his candidacy.

Sincerely,
John Sexton

John Sexton - john.sexton@nyu.edu - 212-992-8040


New York University
A private university in the public service

School of Law

40 Washington Square South, 430F
 New York, New York 10012-1099
 Telephone: (212) 992-8147
 Fax: (212) 995-4590
 Email: arthur.r.miller@nyu.edu

Arthur R. Miller
University Professor

«DateForLetter»

«The_Honorable» «Full_Name»
 «Court_General»
 «Court_Specific»
 «Address 1»
 «Address 2»
 «Address 3»
 «City», «State» «Zip» «COUNTRY»

RE: «Student»

Dear «Salutation» «Last_Name»:

I am writing on behalf of David Schulman, who is applying for a position as your clerk following his graduation from the New York University School of Law in the Spring of 2023. Based on Mr. Schulman's first-year classroom and examination performance, I invited him to be one of my full time research assistants for the summer following his first year. He also was in my Complex Litigation course last Spring and was a teaching assistant for my civil procedure course in the fall of his second year.

As a research assistant Mr. Schulman edited and updated certain portions of the annual supplementation of sections related to federal civil procedure Federal Rules 46 through 50 in the multivolume Wright and Miller Federal Practice and Procedure treatise. In addition he helped update the Civil Procedure hornbook I coauthor, particularly the material related to those rules. This was part of the effort to produce a new edition. In the course of working on these projects, Mr. Schulman did a considerable amount of research, editing, and writing, much of which required a great deal of thought, writing ability, legal analysis, and judgment on his part.

David's research and writing was excellent. His work product was complete and sound, indicating considerable mental ability, a good command of research techniques, good writing, and organizational skills. He also was able to master several aspects of federal civil procedure, some of which are complex. He worked on several topics that were outside the first year procedure course and difficult for someone with only one year of law school. He writes clearly and logically with an good sense of structure and idea sequence.

«The_Honorable» «Full_Name»

«DateForLetter»

Page 2

David is bright, thoughtful, analytically sound, and takes instruction and direction well. He also is constantly aware of the value of professional improvement. Mr. Schulman is a very helpful person by nature. He is conscientious and assisted other researchers to get things done. David's work always was done in timely fashion, with care and attention to detail. He understood fully the professional character and utility of his work. He is curious about issues, both legal and non-legal. I consider David to have been a reliable research assistant.

Mr. Schulman has a solid commitment to the law as a profession. I have no doubt about his seriousness in terms of long-term career development. I am certain he will do well with his law firm experience at Sullivan & Cromwell this summer following his second year of law school. David is a likable and good-natured individual; he has a pleasant personality and is a good conversationalist. I thoroughly enjoy his company, even though a good deal of it, has been virtual. He is mature, broad gauged in his outlook, fields of interest, and is very much interested in the world around him.

On the basis of my experience with him, David should fit in well in the collegial environment of a judge's chambers. He worked effectively with the other researchers the summer he spent with me and that should be true with regard to working with you and your other clerks and staff. I believe he can perform whatever tasks you ask of him.

If I can be of any further assistance to you with regard to David, please do not hesitate to communicate with me.

Sincerely,



Arthur R. Miller



New York University
A private university in the public service

School of Law
Faculty of Law

40 Washington Square South, Room 332
New York, New York 10012-1099
Telephone: (212) 998-6268
Facsimile: (212) 995-4692
Email: marcel.kahan@nyu.edu

Marcel Kahan
George T. Lowy Professor of Law

June 13, 2022

RE: David Schulman, NYU Law '23

Your Honor:

I am writing to recommend David Schulman for a clerkship with you. I am particularly pleased to write this letter.

I know David from the Corporations class he took with me in the fall of 2021. It was a large class, with over 80 students. But despite the class size, David made a lasting impression. His comments were thoughtful and insightful; they showed good judgment, maturity, a high level of analytical skill. Consistent with his superior class participation, David wrote a very good final exam. He received an A- grade, missing the cutoff for an A by a single point.

David is also a strong writer. In college, David concentrated in English and American literature. At law school, he serves as an editor on the Moot Court Board. In the context of writing this letter, I reviewed a brief David wrote for a moot court competition and it is excellent.

Although I had no direct experience working with David, I have on several occasions talked to him after class or during my office hours. I believe that David is conscientious and responsible, has a pleasant personality, and will be easy to work with. In short, David would make an outstanding clerk and I recommend him highly and without reservation.

If I can do anything else to be of assistance, please feel free to call or write me.

Sincerely,

Marcel Kahan
George T. Lowy Professor of Law